
**COPYRIGHT AND FREEDOM OF EXPRESSION:
REVISING THE BERNE CONVENTION**

BY

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Abstract

Commentators' views on the relationship between copyright law and the human right of freedom of expression are currently diverse. The root of the problem lies in the difficulty in balancing authors' rights with human rights in general and the right of freedom of expression in particular.

The thesis aims to illustrate that copyright is challenging the effective recognition of the principles of human rights, in particular the individual's right of freedom of expression. This proposition is submitted through an analysis, carried out at the international, regional and national levels, of copyright and author's right laws in relation to the right of freedom of expression. At the three levels, the author's basic moral and economic rights are juxtaposed against another party's right of freedom of expression, indicating conflicts, current and potential, between the two sets of rights.

Present limitations and exceptions to copyright law are examined in detail in order to determine whether, and if so to what extent, they effectively safeguard another party's right to freedom of expression vis-à-vis the author's rights. The fair use and fair dealing defences, the public interest aspect, the non-protection of ideas and the term of copyright protection are critically analysed to help unmask legal gaps and inconsistencies in this area under various international, regional and national laws.

The thesis proposes that the Berne Convention (1971), generally regarded as the primary international copyright instrument, should be revised in order to alleviate the identified legal inconsistencies and conflicts between the two rights. On the basis that all human beings are entitled to human rights, the proposed revisions introduce firstly, the principle of non-discrimination, so that all authors are protected under the Convention, and secondly, the recognition in the Convention of the human right of freedom of expression, by providing that such right is taken into account in any proceedings concerning the application of the rights granted by the Convention.

Table of Contents

Table of Contents.....3

Acknowledgements.....9

Table of Abbreviations.....11

Introduction.....15

1. BACKGROUND.....15

2. OBJECTIVES AND SCOPE.....17

3. METHODOLOGY.....19

4. GENERAL OUTLINE.....20

CHAPTER 1

Copyright: A General Overview.....24

1.1 INTRODUCTION.....24

1.2 SYSTEMS OF COPYRIGHT PROTECTION.....24

1.2.1 COMMON LAW COPYRIGHT SYSTEM.....25

1.2.2 CIVIL LAW AUTHOR’S RIGHT SYSTEM.....25

1.2.3 COMPOSITE SYSTEMS.....26

1.2.4 MISCELLANEOUS SYSTEMS.....26

1.3 BASIC PRINCIPLES OF PROTECTION.....26

1.3.1 GENERAL.....26

1.3.2 SPECIFIC ASPECTS.....27

1.3.2.1 THE IDEA/EXPRESSION DICHOTOMY.....27

1.3.2.2 THE CONCEPT OF ORIGINALITY.....28

1.3.2.3 MORAL RIGHTS.....30

1.3.2.4 ECONOMIC RIGHTS.....39

1.3.2.5 LIMITATIONS AND EXECPTIONS.....44

1.3.2.6 DURATION OF PROTECTION.....45

1.4 GENERAL OVERVIEW: MULTILATERAL TREATIES AND REGIONAL INSTRUMENTS.....46

1.4.1 MULTILATERAL TREATIES.....46

1.4.1.1 GENERAL.....46

1.4.1.2	BERNE CONVENTION 1886 – 1971.....	47
1.4.1.3	TRIPS AGREEMENT 1994.....	47
1.4.1.4	WIPO COPYRIGHT TREATY 1996.....	48
1.4.2	REGIONAL INSTRUMENTS.....	48
1.4.2.1	EUROPE.....	48
1.4.2.2	NORTH, CENTRAL AND SOUTH AMERICA.....	49
1.4.3.3	OTHER REGIONS.....	49
1.5	HISTORICAL BACKGROUND: NATIONAL LAWS.....	50
1.5.1	GENERAL.....	50
1.5.2	UNITED KINGDOM LAW.....	50
1.5.3	UNITED STATES OF AMERICA LAW.....	51
1.5.4	FRENCH LAW.....	52
1.5.5	GERMAN LAW.....	53
1.6	SUMMARY.....	54

CHAPTER 2

The Human Right of Freedom of Expression: Its Basis and Application		
in Law.....		55
2.1	INTRODUCTION.....	55
2.2	COPYRIGHT AS A HUMAN RIGHT.....	56
2.3	INTERNATIONAL INSTRUMENTS.....	59
2.3.1	INTRODUCTION.....	59
2.3.2	UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948.....	59
2.3.2.1	HISTORICAL BACKGROUND.....	59
2.3.2.2	RECOGNISED RIGHTS.....	60
2.3.2.3	FREEDOM OF EXPRESSION.....	62
2.3.3	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966.....	62
2.3.3.1	HISTORICAL BACKGROUND.....	62
2.3.3.2	RECOGNISED RIGHTS.....	64
2.3.3.3	FREEDOM OF EXPRESSION.....	64
2.4	REGIONAL INSTRUMENTS.....	65
2.4.1	INTRODUCTION.....	65
2.4.2	EUROPEAN CONVENTION ON HUMAN RIGHTS 1950.....	66
2.4.2.1	HISTORICAL BACKGROUND.....	66

2.4.2.2	RECOGNISED RIGHTS.....	67
2.4.2.3	FREEDOM OF EXPRESSION.....	68
2.4.3	AMERICAN CONVENTION ON HUMAN RIGHTS 1969.....	74
2.4.3.1	HISTORICAL BACKGROUND.....	74
2.4.3.2	RECOGNISED RIGHTS.....	75
2.4.3.3	FREEDOM OF EXPRESSION.....	76
2.4.4	AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 1981.....	78
2.4.4.1	HISTORICAL BACKGROUND.....	78
2.4.4.2	RECOGNISED RIGHTS.....	79
2.4.4.3	FREEDOM OF EXPRESSION.....	81
2.5	NATIONAL LAWS.....	81
2.5.1	INTRODUCTION.....	81
2.5.2	UNITED KINGDOM.....	82
2.5.3	UNITED STATES OF AMERICA.....	85
2.5.4	FRANCE.....	89
2.5.5	GERMANY.....	91
2.6	SUMMARY.....	94

CHAPTER 3

Moral Rights and Freedom of Expression: Areas of Potential Conflict.96

3.1	GENERAL OVERVIEW.....	96
3.2	CASES FOR COMPARISON.....	97
3.3	COMPARISON AT INTERNATIONAL LEVEL.....	98
3.3.1	PATERNITY RIGHT AND FREEDOM OF EXPRESSION.....	98
3.3.2	INTEGRITY RIGHT AND FREEDOM OF EXPRESSION.....	100
3.4	COMPARISON AT REGIONAL LEVEL.....	102
3.5	COMPARISON AT NATIONAL LEVEL.....	103
3.5.1	INTRODUCTION.....	103
3.5.2	UNITED KINGDOM.....	104
3.5.2.1	FALSE ATTRIBUTION AND FREEDOM OF EXPRESSION.....	104
3.5.2.2	INTEGRITY RIGHT AND FREEDOM OF EXPRESSION.....	108
3.5.3	UNITED STATES OF AMERICA.....	111
3.5.3.1	PATERNITY RIGHT AND FREEDOM OF EXPRESSION.....	111
i	GENERAL PRINCIPLES.....	111

ii	VISUAL ARTISTS RIGHTS ACT 1990.....	118
3.5.3.2	INTEGRITY RIGHT AND FREEDOM OF EXPRESSION.....	120
i	GENERAL PRINCIPLES.....	120
ii	VISUAL ARTISTS RIGHTS ACT 1990.....	123
3.5.4	FRANCE.....	125
3.5.4.1	PATERNITY RIGHT AND FREEDOM OF EXPRESSION.....	125
3.5.4.2	INTEGRITY RIGHT AND FREEDOM OF EXPRESSION.....	127
3.5.5	GERMANY.....	129
3.5.5.1	PATERNITY RIGHT AND FREEDOM OF EXPRESSION.....	129
3.5.5.2	INTEGRITY RIGHT AND FREEDOM OF EXPRESSION.....	130
3.6	SUMMARY.....	133

CHAPTER 4

Economic Rights and Freedom of Expression: Areas of Potential

Conflict.....	135
4.1	GENERAL OVERVIEW.....135
4.2	CASE FOR COMPARISON.....136
4.3	COMPARISON AT INTERNATIONAL LEVEL.....137
4.4	COMPARISON AT REGIONAL LEVEL.....138
4.5	COMPARISON AT NATIONAL LEVEL.....139
4.5.1	INTRODUCTION.....139
4.5.2	UNITED KINGDOM.....141
4.5.2.1	REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION.....141
4.5.3	UNITED STATES OF AMERICA.....149
4.5.3.1	REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION.....149
4.5.4	FRANCE.....163
4.5.4.1	REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION.....163
4.5.5	GERMANY.....170
4.5.5.1	REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION.....170
4.6	SUMMARY.....177

CHAPTER 5

Copyright Limitations and Exceptions in Conflict Resolution.....179

5.1	GENERAL OVERVIEW.....	179
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5.2 THE FAIR DEALING AND FAIR USE EXCEPTIONS.....181

5.2.1 THE FAIR DEALING DEFENCE.....182

5.2.2 THE FAIR USE DOCTRINE.....186

5.2.3 CONCLUSIONS.....187

5.3 THE PUBLIC INTEREST ASPECT.....189

5.3.1 THE CONCEPT OF PUBLIC INTEREST IN NATIONAL COPYRIGHT LAWS.....190

5.3.2 A STATUTORY PUBLIC INTEREST?.....195

5.3.3 CONCLUSIONS.....199

5.4 NON-PROTECTION OF IDEAS.....200

5.5 TERM OF COPYRIGHT PROTECTION.....209

5.6 SUMMARY.....211

CHAPTER 6

Proposals and Conclusion.....212

6.1 INTRODUCTION.....212

6.2 MAIN PROPOSALS IN OUTLINE.....213

6.3 RECOGNITION OF THE RIGHT OF FREEDOM OF EXPRESSION.....216

6.4 INTRODUCTION OF THE PRINCIPLE OF NON-DISCRIMINATION.....218

6.4.1 GENERAL.....218

6.4.2 AUTHORS’ PROTECTION.....220

6.4.2.1 STATUTORY PROVISIONS UNDER THE BERNE CONVENTION 1971.....220

6.4.2.2 STATUTORY PROVISIONS UNDER PROPOSED REVISION.....221

6.4.3 COUNTRY OF ORIGIN.....222

6.4.3.1 STATUTORY PROVISIONS UNDER THE BERNE CONVENTION 1971.....222

6.4.3.2 STATUTORY PROVISIONS UNDER PROPOSED REVISION.....226

6.5 SUMMARY.....228

6.6 CONCLUSION.....229

ANNEXES TO CHAPTER 6.....231

ANNEX 1: Comparative Table; Berne Convention and Proposed Revisions232

ANNEX 2: Authors’ Protection – Effect of Proposals.....242

ANNEX 3: Country of Origin – Effect of Proposals.....249

APPENDICES.....257

**APPENDIX 1: “Solemn Declaration” by the Assembly of the Berne Union of 9
September 1986.....258**

**APPENDIX 2: Table of Membership of International Copyright and Human
Rights Instruments.....262**

APPENDIX 3: Table of Membership of Regional Human Rights Instruments.....268

Bibliography.....270

Table of Cases.....284

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Table of Abbreviations

aff'd	affirmed
ALAI	Association Littéraire et Artistique Internationale
All E.R.	All England Law Reports
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, Paris text, 1971
BGH	Bundesgerichtshof
B.H.R.C.	Butterworths Human Rights Cases
BVerfGE	Bundesverfassungsgericht
B.Y.U.L. Rev.	Brigham Young University Law Review
C.A.	Court of Appeal
C.F.I	Court of First Instance
Calif. L. Rev.	California Law Review
Cardozo Arts & Ent. J.	Cardozo Arts and Entertainment Journal
Cartagena Decision 351	Decision 351 on Author's Right and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement
Cass.	Cour de Cassation
Cass. Civ.	Cassation Chambre Civile
CDPA	Copyright, Designs and Patents Act, 1988
cert. denied	certiorari denied
Ch. D.	Law Reports, Chancery Division
Cir.	Circuit Court of Appeals, United States
C.L.J.	Cambridge Law Journal
C.M.L.R.	Common Market Law Report
Colum. L. Rev.	Columbia Law Review
D.C.	District Court, United States
ECJ	European Court of Justice
EC	European Community
E.Comm.H.R	European Commission of Human Rights
ECtHR	European Court of Human Rights

E.C.L.R.	European Competition Law Review
E.C.R.	European Court Reports
E.H.R.L.R.	European Human Rights Law Reports
E.H.R.R.	European Human Rights Reports
E.I.P.R.	European Intellectual Property Review
E.M.L.R.	Entertainment and Media Law Reports
Emory L.J.	Emory Law Journal
Ent. L. Rev.	Entertainment Law Review
EU	European Union
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F. Supp.	Federal Supplement
Fed.	Federal
Fordham Intell. Prop. Media & Ent. L.J.	Fordham Intellectual Property, Media & Entertainment Law Journal
F.S.R.	Fleet Street Reports (UK)
Geo. L. J.	Georgetown Law Journal
G.R.U.R. Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
Harv. L.R.	Harvard Law Review
H.L.	House of Lords
Houston L. Rev.	Houston Law Review
H. Rep.	House Report of United States Chamber of Representatives
H.R.L.J.	Human Rights Law Journal
H.R.Q.	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights, 1996
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
I.C.L.Q	International and Comparative Law Quarterly

IDEA: J. of Law & Tech.	Journal of Law and Technology, Franklin Pierce Law Centre
I.I.C.	International Review of Industrial Property and Competition Law
I.P.Q.	Intellectual Property Quarterly
I.P.R.	Intellectual Property Reports
J. Copy. Soc'y	Journal of the Copyright Society of the USA
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
NAFTA	North American Free Trade Agreement, 1992
NW.U.L. Rev.	Northwestern University Law Review
O.J.	Official Journal
QB	Law Reports, Queen's Bench Division
Rev.	Review
rev'd	reversed
R.J.D.	Reports of Judgments and Decisions of the ECtHR from 1996 onwards
R.P.C.	Report of Patents, Design and Trade Mark Cases
S.Ct.	Supreme Court
Series A	Official report of all judgments of the ECtHR up to 1995
Stanford L. Rev.	Stanford Law Review
TGI	Tribunal de Grande Instance
TRIPS Agreement	Agreement on Trade-related Aspects of Intellectual Property Rights, 1994
UCLA L. Rev.	University of California Los Angeles Law Review
U.F.I.T.A.	Archiv für Urheber -, Film -, Funk - und Theaterrecht
UNESCO	United Nations Educational, Scientific and Cultural Organisation
U.S.	United States Supreme Court Reports
U.S.P.Q.	United States Patents Quarterly
Universal Declaration	Universal Declaration of Human Rights, 1948
Vand. L.Rev.	Vanderbilt Law Review
WCT	WIPO Copyright Treaty, 1996
WIPO	World Intellectual Property Organisation

W.L.R.	Weekly Law Reports
Yale L.J.	Yale Law Journal

Abbreviations of Books

Nimmer	Nimmer, M.B. and Nimmer, D., <i>Copyright</i> (Matthew Bender, looseleaf, 1963-)
Ricketson and Ginsburg	Ricketson, S., and Ginsburg, J., <i>International Copyright and Neighbouring Rights – The Berne Convention and Beyond</i> (2 nd ed., Oxford University Press, 2006)
Sterling	Sterling, J.A.L., <i>World Copyright Law</i> (2 nd ed., Sweet & Maxwell, 2003)

Introduction

1. BACKGROUND

The relationship between copyright and freedom of expression is controversial. Two opposing views have surfaced. At the one end of the spectrum is the argument that copyright is one of the means of securing freedom of expression as “Copyright guarantees the author a share in the marketing of his works, and as such is a means of securing the independence of authors from patronage, and possibly influence, by individuals or the state”¹.

At the other end, there is the argument that “Copyright is antithetical to freedom of expression. It prevents all, save the owner of copyright, from expressing information in the form of the literary work protected by copyright”². Partisans of freedom of expression argue that having to ask for the author’s permission in order to use his expression, or part of it, and occasionally the author’s invoking of his moral rights critically limit another party’s freedom of expression.

There has been extensive discussion on the relationship between copyright and freedom of expression over the years in the United States of America³. However, the discussion has only flared up recently on a European level⁴ and, to an extent, on a national level⁵. As a result, the interaction between the two rights constitutes a

¹ See, Jehoram, H.C., “Freedom of Expression in Copyright Law” [1984] 1 E.I.P.R. 3.

² *Ashdown v. Telegraph Group Ltd* [2001] E.M.L.R. 44 (C.A.) per Lord Phillips M.R. at para.30.

³ See, for example, Goldstein, P., “Copyright and the First Amendment” (1970) 70 Columbia L.R. 983; Nimmer, M.B., “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) 17 UCLA L.R. 1180; Zimmerman, S.S., “A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict” (1986) 35 Emory L.J. 163.

⁴ See, for example, Jehoram, H.C., “Freedom of Expression in Copyright Law” [1984] 1 E.I.P.R.3; Hugenholtz, P.B., “Copyright and Freedom of Expression in Europe” in *The Commodification of Information* (Elkin-Koren, N. and Netanel, N.W., (eds), Kluwer, 2002).

⁵ See, for example, Griffiths, J., “Copyright Law and Censorship – The Impact of the Human Rights Act 1998” (1999) 4 *The Yearbook of Copyright and Media Law* 3; Birnhack, M., “Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the

grey area; no clear boundaries have been drawn between the rights, and there is no general consensus as to the role of freedom of expression in the context of copyright.

This uncertainty in the relationship between copyright and the right to freedom of expression raises important issues which require comprehensive answers and which will be examined in the context of the thesis:

- Is it desirable or valid for human rights to have priority over or even restrict forms of property rights?
- Can one conclude that copyright (taken as embracing both the moral and economic rights) is too wide a right and thus requires further restrictions imposed upon it? If so, would the human right to freedom of expression be an appropriate means for laying down such restrictions?
- Should moral and/or economic rights principles be altered in order to take into account instances of clash between them and the right to freedom of expression?
- If it is argued that copyright is a property right, then taking into account that the right to property is a human right, could one view the issue as a conflict between the human rights of property and freedom of expression rather than between intellectual property and human rights?
- Alternatively, if one assumes that copyright is in itself a human right under Article 27 of the Universal Declaration of Human Rights, should the issue be viewed as a potential conflict between the human rights of copyright and freedom of expression?

In recent years, freedom of expression has gradually assumed a more important role. Sedley L.J. has gone as far as stressing the importance of protecting unpopular speech:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the

Human Rights Act" [2003] 14(2) Ent.L.Rev.24; Netanel, N.W., "Market Hierarchy and Copyright in Our System of Free Expression" (2000) Vanderbilt L.Rev. 53:6, 1879.

provocative, provided it does not provoke violence. Freedom only to speak inoffensively is not worth having⁶.

This trend of analysis of the right to freedom of expression is of critical relevance in the present context; it raises questions about the nature and scope of the right. The thesis examines whether extending the right beyond a certain limit could lead to infringement both of the moral and economic rights of the author.

2. OBJECTIVES AND SCOPE

The thesis studies the relationship between copyright and the right to freedom of expression. Currently, both sets of rights are safeguarded at international, regional and national levels. The thesis enquires into whether, at present, a balance is struck between the creator's right to protect the original expression of his work and the general public's right to exercise its right of freedom of expression.

Taking into account the number of legislative instruments in place guaranteeing copyright and freedom of expression and the diversities among their respective provisions, the thesis examines the rights relationship within the context of:

- International instruments, treaties and conventions.
- Regional instruments, including directives, conventions and charters within the European Community and the American and African Regions.
- National laws covering both common and civil law jurisdictions.

The thesis will not be examining the issue of privacy and its repercussions on the thesis proposition in detail even though it is considered to be an important issue in the present context. However, judicial decisions on privacy that may have an impact on the considerations of this thesis will be referred to and their implications will be discussed.

⁶ *Redmond-Bate v. DPP* (1999) 7 B.H.R.C. 375, 382, 383; and, see *Silkin v. Beaverbrook Newspapers Ltd* [1958] 1 W.L.R. 743 in which Diplock J. described freedom of speech as "the right of the crank to say what he likes".

The thesis focuses on the author's copyright/author's right. It does not analyse the position with regard to related (neighbouring) rights⁷ even though they enjoy legal protection at international, regional and national levels⁸. This work does not aspire to make specific recommendations regarding related rights.

Similarly, the work does not deal with the question of the relationship between the right of freedom of expression and the proposed rights which may be granted with respect to traditional cultural expressions.

The thesis has two main objectives. Primarily, it examines whether the protection of the respective rights gives or can give rise to conflicts and where those conflicts might arise. In particular, the thesis analysis considers whether copyright protection encroaches on the safeguard of the human right to freedom of expression; whether currently implemented legislation and case law tends to result in the author's overprotection and/or the general public's under-protection; and whether such tendencies can constitute evidence for even greater future conflicts. In the context of the thesis, a "conflict" is a situation which arises or may arise where one party claims that his copyright is infringed by an act which another party claims is

⁷ As such, the thesis does not examine the following international and regional instruments:

- Rome Convention 1961
- Phonograms Convention 1971
- WIPO Performances and Phonograms Treaty 1996
- EC Rental/Lending and Related Rights Directive 1992

⁸ Related rights include the rights of performers, phonogram and film producers, wireless broadcasters and cable distributors.

Performers are protected under the Rome Convention 1961 (Article 7), the TRIPS Agreement 1994 (Article 1(3)), the WIPO Performances and Phonograms Treaty 1996 (Articles 2(a) and 3), the EC Rental/Lending and Related Rights Directive 1992 (Article 2(1)) and Cartagena Decision 351 (Article 34).

Phonogram producers are protected under the Phonograms Convention, the TRIPS Agreement 1994 (Article 1(3)), the WIPO Performances and Phonograms Treaty 1996 (Articles 2(d) and 3), the EC Rental/Lending and Related Rights Directive 1992 (Article 2(1)), NAFTA 1992 and Cartagena Decision 351 (Article 2).

Film producers are protected under the EC Rental/Lending and Related Rights Directive 1992 (Article 2(1)).

Wireless Broadcasters are protected under the Rome Convention 1961 (Article 6), the TRIPS Agreement 1994 (Article 1(3)) and the EC Rental/Lending and Related Rights Directive 1992 (Article 2(1)).

Cable distributors are protected under the EC Rental/Lending and Related Rights Directive 1992 (Article 2(1)).

Publishers are protected under national legislation. See, Author's Right and Related Protection Rights Law (Articles 70 and 71) and CDPA 1988 (section 1(1)(c)).

justifiable by the exercise of a human right, and *vice versa*, and where such a situation reveals that there is a serious issue to be examined.

The secondary objective of the thesis is to put forward a legislative proposal that might serve as a solution to conflicts between copyright and freedom of expression. The importance of the proposal lies in its potential attributes: (a) it can be applied at all three levels, that is international, regional and national, (b) it can be implemented by economically developed and developing countries alike, (c) it provides a solution to clashes or gaps in the law observable at present, and (d) it can act as a preventive measure for clashes that may develop in the future due to the evolving nature of the legal rights in question and to technological advances.

3. METHODOLOGY

For the purpose of interpreting and analysing international, regional and national laws and case law, the thesis adopts a comparative law approach.

For the purposes of the thesis, comparison at the international level means a comparison of the relevant international copyright and human rights instruments, and any conflicts that may arise between them, as opposed to an examination of countries in general. In view of the aims and recommendations of the thesis, it is considered that such analysis will, from a copyright law perspective, give an accurate general illustration of the international picture, as practically all countries have ratified the Berne Convention. From a human rights law perspective, almost every regional and national legislation has been inspired by the Universal Declaration on Human Rights.

The thesis refers both to civil and common law systems, since they have notable differences in their approach to copyright law. Even within those two broad legal systems, one can trace various distinctive national features that have to be addressed, as they directly affect the nature of copyright and consequently its relationship with human rights. As it is not here feasible to examine individually the laws of every country in the world, the thesis in the main makes specific reference to those countries with developed copyright/author's right laws and human rights laws. For these reasons, the thesis examines the national laws of the United

Kingdom and United States under the common law system and those of France and Germany under the civil law system.

The analysis adopted in this work is mainly founded upon two principal sources of reference:

- I. *National and European Community legislative instruments and judicial decisions.*
- II. *Legal literature and consultation documents.* These public sources have been employed in order to complement and extend the scope of the analysis. Legal commentaries and committee reports have been of particular relevance in the examination of developing countries, in view of the lack of concrete legislation or case law in certain legal areas. Moreover, such sources serve as a tool for comparison between vague concepts adopted under various international instruments, and have proved significant in the critical analysis regarding civil law countries that do not embrace the principle of precedent in case law.

The thesis adopts a wider comparative approach in order to lay down accurately the problems and propose viable solutions. However, certain limits have also been set on the width of the coverage of the subject. As such, the copyright issue is analysed from the perspective of the creative author, and the author's right is to be understood in the civil law sense viewed as a human personality right. Here it may be noted that there are differences in national laws as to the persons regarded as authors.

4. GENERAL OUTLINE

The structure of the work reflects the complex nature of the relationship between copyright and freedom of expression. It also contemplates the assimilation of a number of different legal approaches whose consideration is relevant to the thesis, conclusions and recommendations.

The thesis is divided into six Chapters:

- Chapter 1 – Copyright: A General Overview
 - Chapter 2 – The Human Right of Freedom of Expression: Its Basis
And Application in Law
 - Chapter 3 – Moral Rights and Freedom of Expression: Areas of
Potential Conflict
 - Chapter 4 – Economic Rights and Freedom of Expression: Areas of
Potential Conflict
 - Chapter 5 – Copyright Limitations and Exceptions in Conflict Resolution
 - Chapter 6 - Proposals and Conclusion
-
- Chapter 1 is introductory and as such describes the historical background, basic concepts and principles of protection of copyright law.

The Chapter sets out the main systems of copyright protection and examines important differences between them, focusing on the following topics:

- terminology, and the basic approaches of the common law and civil law systems
 - the basic principles of protection under copyright law
 - duration of copyright
 - a short analysis of the author's moral rights
 - an analysis of the author's economic rights
 - the main limitations and exceptions
 - the development of copyright law at international, regional and national levels
 - in addition, the historical background and main copyright provisions under relevant multilateral treaties, European Directives, American Agreements and national statutes are analysed.
-
- Chapter 2 examines the basis and application of human rights, with particular emphasis on the right to freedom of expression. It provides:
 - the historical background of international, regional and national instruments that safeguard the right

- a general overview of protection of human rights as relevant in the thesis
- a detailed study of the right to freedom of expression under these instruments and how it should be interpreted under the relevant provisions

It also examines copyright in its aspect as a human right. The Part concludes with a discussion of the duration of human rights in general, and the right to freedom of expression in particular.

- Chapter 3 examines the interaction between the author's moral rights, and in particular, the rights of paternity and integrity, and another party's right of freedom of expression, and the general areas of potential conflict between them. The Chapter starts with an introductory section that sets out the methodology and structure of the Chapter. The Chapter examines the rights relationship on a comparative basis. As a result, the international, regional and national copyright instruments are juxtaposed against international, regional and national human rights instruments. This Chapter aspires to propose situations where the protection afforded by moral rights on one hand and the right of freedom of expression, on the other gives rise to tensions between the respective rights, with the possibility of jeopardizing an individual's legal protection. It is important to identify areas where the two sets of rights are complementary and areas where they are not. In order to reach a comprehensive conclusion in such situations, instruments within the international, regional and national contexts are examined.
- Chapter 4 examines the interaction between the author's economic right of reproduction and another party's right of freedom of expression. The structure and approach of analysis of the Chapter follows that of Chapter 3. The relevant rights are examined on a comparative basis on the international, regional and national levels. Relevant case law and statutory provisions are discussed in order to draw comprehensive conclusions

regarding the rights interaction and to identify situations that illustrate legal gaps, inconsistencies and uncertainty in this context.

- Chapter 5 represents the next step in the development of the hypothesis of the thesis. Situations of potential conflict between the two sets of rights having been identified, this Chapter questions whether existing copyright limitations and exceptions soften or have the potential of reducing the tensions. An introductory section is followed by an examination of the fair use/fair dealing exceptions, the public interest aspect, the principle of non-protection of ideas and the limited term of copyright protection.

If one concludes that current exceptions and limitations may alleviate potential conflicts, the basis of a solution is already in place. However, it is the intention of this Chapter to show that this is not the case and as such, different solutions have to be devised, and are presented in Chapter 6.

- Chapter 6 puts forward the solutions of the thesis. The proposals are in the form of a concrete and practical, as opposed to a rhetorical, solution. They relate mainly to the international level and reflect the thesis approach that copyright and freedom of expression should no longer be viewed and treated as separate, yet complementary, rights but rather as two rights of a different nature in that they should each be given adequate legal consideration within copyright law. If copyright is viewed as a human right itself then copyright and freedom of expression should be treated as two distinct human rights with courts and legislatures expressly balancing their respective importance and consequently, balancing the rights of the individuals in whom these rights are vested.

Overall, the proposed solutions aspire to create a novel legal landscape within the area of international copyright law in order to harmonise it with the right of freedom of expression and more importantly to return it to its roots as a human right.

CHAPTER 1

Copyright: A General Overview

1.1 INTRODUCTION

The chapter maps out the international, regional and national landscapes of protection and status of copyright.

It examines the systems of protection, focusing on the distinction between the common (copyright) and civil (author's right) law system.

In addition, it discusses the basic principles of copyright protection and briefly analyses their general underlying concepts with a view to illustrating the different national approaches. Such principles are examined in the context of international, regional and national laws and their connection to subsequent parts of this work is highlighted, where necessary.

The final sections of the Chapter provide a general overview of the international and regional copyright instruments as well as the historical background to the development of national copyright laws.

1.2 SYSTEMS OF COPYRIGHT PROTECTION

Copyright, albeit a comparatively young right¹, has evolved into a system of rights that relates to a wide variety of subject-matter ranging from books, pictures, photographs, films, sound recordings and broadcasts to buildings, sculptures and paintings. Having gained worldwide acceptance as a legal right, copyright has, as a

¹ In the ancient world of Greece and Rome, and even during the Middle Ages, the possibility of making multiple copies of a work were negligible as no technical means for copying had been developed. The situation changed with the introduction of printing into Western Europe around 1450, which made rapid reproduction of texts and their distribution to the public possible.

result, been accepted in numerous countries whose social, economic and political backgrounds differ dramatically. Two distinct systems of protection developed; the copyright system in the common law countries and the author's right system in civil law countries.

Even though the great majority of national laws fall under one of those systems, there are some national legislations that have adopted a composite system, that is a system that draws elements both from the copyright and author's right systems, and also add different features of their own. In general however, there are considerable variations between different countries within the same system.

1.2.1 COMMON LAW COPYRIGHT SYSTEM

The foundation of copyright within the common law system may be said to be the grant of rights of an economic nature to prevent the copying, public performance, broadcasting and other uses of protected material. Copyright is said to embrace a negative concept, in that its owner has the right to prevent any reproduction or use of his material which he has not authorised.

The copyright law system is characteristic of the common law system and applies in the United Kingdom and the Commonwealth, Ireland and United States.

1.2.2 CIVIL LAW AUTHOR'S RIGHT SYSTEM

The countries with an author's right system have drawn their inspiration largely from the Roman law heritage, in addition to other sources and, by giving precedence to written law, many of them have opted for a systematic codification of their law. This system regards author's right as a natural and human right: "la plus sacrée, la plus légitime, la plus inattaquable ... la plus personnelle de toutes les propriétés"². The basic theory of the protection of authors lies in the premise that the right is inextricably linked to the personality of the author; it is the creation of the author's mind.

² Le Chapelier, *Le Moniteur Universel*, 15 January 1791. Cited in Renouard, A.C., *Traité des droits d'auteur dans la littérature, les sciences et les beaux-arts*, 2 vol., Paris, Jules Renouard, 1838-1839 at p. 309 (volume 1). For a detailed discussion and text of Le Chapelier's Report, see Sterling at pp. 51-53.

The author's right is characteristic of the civil law system and applies, in particular in Continental Europe, Central and South America and some African countries.

1.2.3 COMPOSITE SYSTEMS

Composite systems of protection draw elements both from copyright and author's right systems, while at the same time adding distinctive features of their own. Examples of composite systems are the laws of China and Japan³.

1.2.4 MISCELLANEOUS SYSTEMS

Miscellaneous systems of protection are systems that do not fit into any of the above-mentioned classifications. Such systems do provide protection rules, albeit of a character different from those of the copyright and author's right systems. The Law of Saudi Arabia may, for example, be said to be in this category⁴.

1.3 BASIC PRINCIPLES OF PROTECTION

1.3.1 GENERAL

Copyright and author's right laws alike are founded upon a skeleton of basic principles. The aim of this section is two-fold. Firstly, it aspires to set out the general legal framework within which this intellectual property right operates and, in particular, the conditions under which it is granted, the nature and limitations of the right available and the circumstances under which infringement of such a right or rights can be successfully established.

Secondly, this part seeks to illustrate that some copyright principles are diverse not only among international and regional instruments but also among national jurisdictions.

For the purposes of the thesis, the basic principles of copyright/author's right protection that are discussed are as follows:

- The idea/expression dichotomy
- The concept of originality/creativity
- Moral rights

³ Composite systems are in general not considered in this thesis.

⁴ Miscellaneous systems are not directly relevant for the purposes of the thesis.

- Economic rights
- Limitations and exceptions
- Duration of protection

1.3.2 SPECIFIC ASPECTS

1.3.2.1 THE IDEA/EXPRESSION DICHOTOMY

The idea/expression dichotomy principle suggests that there is a distinction between, on the one hand, an author's mere idea, which is not protected under copyright and, on the other, its creative expression, which is protected⁵.

The exclusion of ideas from copyright protection has been a judicial development. Prior to the TRIPS Agreement 1994⁶ there had been no such exclusion in the international and regional copyright instruments.

This principle has been the basis of copyright jurisprudence in many countries⁷. The 1976 US Copyright Act expressly acknowledges the principle under s.102(b)⁸. One can however trace the concept's origins further back in time as early as 1879⁹.

⁵ For a discussion of the idea/expression dichotomy principle and freedom of expression see Burrell, R. and Coleman, A., *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005), Chapter 1.

⁶ Article 9(2) of the TRIPS Agreement provides that "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such". Similarly Article 2 of the WIPO Copyright Treaty 1996 recognizes the concept in the same wording as TRIPS. In contrast, the Berne Convention contains no statement of this principle.

⁷ New Zealand: *Plix Products Limited v. Frank M. Winstone (Merchants) and Others* (1986) F.S.R. 63, and for a detailed discussion of the case and Pritchard J.'s judgement, see Suthersanen, U., "Exclusions to Design Protection – A New Paradigm" in *Perspectives In Intellectual Property* (Vol.2, ed. Sterling) (Sweet & Maxwell, 1997) at p.49.

UK: "It is an assumption of British copyright legislation that all subject matter requires to exist in some material form before it gains copyright. It is possible to look upon this as a corollary of the principle that the protection goes only to the particular expression of ideas", Cornish, W.,R., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th ed., Sweet & Maxwell, 2003) at p.277.

⁸ "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work".

⁹ In *Baker v Selden* 101 U.S. 99 (1879), the U.S. Supreme Court stated that where there is only one way of expressing an idea, the idea has inextricably merged with the expression and thus no protection will be available, at p.179.

The issue of what constitutes an idea is controversial. At what point an unprotectable idea ends and a protectable original expression¹⁰ begins is an aspect not possible to define precisely. Thus, each situation has, to an extent, to be assessed on its own merits¹¹.

1.3.2.2 THE CONCEPT OF ORIGINALITY/CREATIVITY

Most national jurisdictions provide that for a work to be protected under the copyright or author's right system, it must be an intellectual creation or possess original elements.

In general, there appears to be no internationally accepted definition of the term "originality". However, it is generally acknowledged that the term can have two meanings depending on the legal system from which it originates. Given the lack of express statutory definition, the boundaries of this principle rest largely on judicial interpretation.

As a general rule, civil law countries and the United States determination of originality is divergent from that of the United Kingdom and other Commonwealth countries (and Ireland). Nevertheless, it can be said that interpretative differences can be traced not only among the various national laws, but also within judicial precedents of individual jurisdictions themselves¹².

In order for an author's work to be original it has to fulfil a rather high threshold in that it has to be the author's own creative work. In France, the general theory of the Cour de Cassation is that for a work to be original it must bear "the mark of the personality of its author and confer on the created object a specific aspect", the

¹⁰ For judicial development of the concept in the US, see *Nichols v. Universal Pictures* 45 F.2d 119 (1930). See also Sterling at p.220.

¹¹For an extensive discussion of what has been held to constitute an idea and the application of the idea/expression dichotomy on literary, dramatic and musical works, see Laddie, H., Prescott, P. and Vitoria, M., *The Modern Law of Copyright and Designs* (3rd ed., Butterworths, 2000), at pp. 97-114.

The principle of non-protection of ideas and its implications, present and potential, in the context of the relationship between copyright and the human right of freedom of expression, are discussed extensively in para. 5.4.

¹² For a discussion of the various interpretations attached to the concept of originality, see generally Sterling at p.176.

“seal of the personality of the author”¹³ or a “reflection of the personality of the author”¹⁴. In *Babolat Maillot Witt v. Pachot*¹⁵, the Court departed from the criterion of “mark of personality”, focusing instead on the author’s “intellectual contribution” (*apport intellectuel*)¹⁶.

German law will protect personal intellectual creations provided there is some independent intellectual activity, albeit not now one of a particularly high standard. The “small change” provision, under which author’s right has been granted to works such as forms and catalogues, is evidence of the relatively low creativity threshold¹⁷.

The US test for originality previously embraced the so-called “sweat of one’s brow”¹⁸ theory, according to which the work had to “owe its origin to the author”¹⁹ and effort, time, knowledge and skill must have been expended in its preparation²⁰. However, in 1991, the Supreme Court, in *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*²¹, rejected this approach and stated that what was required was a “modicum of creativity”.

¹³ Decision of CA Paris, 1e ch., April 1, 1957: (1957) 18 R.I.D.A. 198.

¹⁴ Decision of CA Paris, 4e ch., March 4, 1982: 1983 *Dalloz* 93.

It could however be argued that, in relation to computer programs and compilations, French jurisprudence has shifted and that it resembles more the common law standard. Lucas and Lucas do acknowledge that this “logiciel” area is controversial, as these works do not present information or “sentiments” to other people but merely permit the use of machines. See, Lucas, A. and Lucas, H.J., *Traité de la Propriété Littéraire et Artistique* (2nd ed., Litec, 2001) at p. 97.

¹⁵ *Babolat Maillot Witt v. Pachot*, Cass., March 7, 1986: (1986) 129 R.I.D.A 130.

¹⁶ These cases predate the introduction of the EC Database Directive 1996.

¹⁷ Stewart, S.M., *International Copyright and Neighbouring Rights*, (2nd ed., Butterworths, 1989).

¹⁸ *Schroeder v. William Morrow & Co*, 566 F. 2d 3 (7th Cir. 1977).

¹⁹ Per Judge Jerome Frank in *Alfred Bell & Co Ltd v. Catalda Fine Arts Inc.*, 191 F. 2d 99 (2d Cir. 1951).

²⁰ *Rand McNally & Co v. Fleet Management Systems*, 634 F. Supp. 604 (ND Ill 1986).

²¹ 499 U.S. 340 (1991). In this case, the court denied protection to a White Pages telephone directory as the plaintiff’s selection, co-ordination and arrangement of its listings did not satisfy the minimum Constitutional requirements for copyright protection, in respect of the notion of “author”.

In order for an author's work to be original under UK law, it must generally satisfy three conditions. Firstly, it must not be merely a copy of a previous work²².

Secondly, it must originate from the author²³ and thirdly, the work must be the product of a reasonable degree of individual skill, judgement and labour; if it is only trivial, the work will not attract copyright²⁴.

1.3.2.3 MORAL RIGHTS

It is generally accepted, on the international and national levels, that copyright has a dual task, and thus a dual structure. On the one hand, it protects the author's interests in the financial/commercial exploitation of his work through economic rights²⁵. On the other, it safeguards the author's "intangible"²⁶ interests that relate to his personality and the integrity of his work.

Moral rights, as opposed to economic rights, only began to be recognized in the beginning of the nineteenth century, with France and Germany considered being their precursors²⁷.

As a general rule, civil and common law countries have had different approaches to the endorsement of moral rights. While the civil law countries called for the author's

²² In *Interlego AG v. Tyco Industries Inc.* [1989] A.C. 217, the meticulous copying of technical drawings which were out of copyright was held not to be significant enough as to qualify for copyright protection.

²³ In *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch. 601 (Ch. D.), Peterson J. stated that "the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work, that it should originate from the author".

²⁴ In *G.A. Cramp & Sons Ltd. v. Frank Smythson Ltd.* [1944] A.C. 329, the House of Lords concluded that the layout of a pocket diary did not constitute an appreciable contribution and thus did not attract copyright, being merely a "commonplace selection of goblets of information and a commonplace arrangement, neither of which involved any real exercise of knowledge, labour, judgement or skill" (per Viscount Simon LC at p. 334). In *Exxon Corp. v. Exxon Insurance Consultants International Ltd.* [1982] R.P.C. 69, the House of Lords refused copyright protection to the single word EXXON as being too short, even though extensive research had gone into devising this name for a commercial enterprise.

In Australia and Canada, the questions of creativity and of invested labour in relation to the criterion of originality have been discussed in a number of cases. For details, see Sterling at pp. 316-321.

²⁵ For a general discussion of the author's economic rights, see para. 1.3.2.4.

²⁶ Dietz, A., *Copyright Law in the European Community* (Sijthoff & Noordhoff, 1978) at p.66.

²⁷ For a more detailed discussion, see Dietz, A., "Legal Principles of Moral Rights in Civil Law Countries" (1993) 2 Copyright Reporter 1, and Roeder, M.A., "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators" (1940) 53 Harv. L. Rev. 554.

reputation and integrity to be explicitly protected by specific statutory rights, common law countries in general considered that such rights were already being protected under contract and defamation laws²⁸. However, these countries have begun to change their stance towards greater endorsement of moral rights²⁹.

ON The Berne Convention appears to adopt the author's right approach to moral rights, which are viewed as personal rights embodying the notion that the author's work is an extension of his being.

Under the Convention, the rights are generally regarded as inalienable³⁰ and last for at least as long as the author's economic rights³¹. Article 6*bis* of the Convention guarantees the author the moral rights of paternity and integrity in his work.

] The right of paternity³² guarantees the author's positive right to have his authorship of his works recognised in a clear and unambiguous way and the negative right of false attribution. Thus, the right can be invoked in situations where:

- no reference is made to the author at all,
- reference is made, albeit in an unclear fashion, or
- the work is attributed to a person other than the author³³.

The integrity right is recognised under Article 6*bis*(1) and is defined as the author's right "to object to any distortion, mutilation or other modification of, or other

²⁸ Sterling at p. 338.

²⁹ It is important to note however that their original reluctance towards moral rights, and especially that of the United States, is reflected in Article 9(1) of the TRIPS Agreement which, while imposing on Member States the obligation to comply with the provisions of the Berne Convention, excludes obligations under Article 6*bis* in this respect.

³⁰ Note that the Convention does not expressly state so.

³¹ Berne Convention 1971, Article 6*bis*(2). This duration provision is different from that in some national laws, which protect the author's moral rights in perpetuity; for example, French Intellectual Property Code 1992, article L.121-1.

³² Berne Convention 1971, Article 6*bis*(1).

³³ The paternity right under Article 6*bis* does not appear to apply to a situation where the author is seeking to deny (as opposed to seeking to establish) his authorship. See, Ricketson and Ginsburg at p.601.

derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation”³⁴.

“Distortion, mutilation or other modification of, or other derogatory action”: The wording is wide enough to cover any change made to the author’s work. Ricketson and Ginsburg indicate that the test for “derogatory action” is subjective and suggest that examples of changes to a work would include typographical errors and colour imperfections (in cases of reproduction), deletions or additions to the text, paraphrases of literal works, rearrangement of a musical work to a different style or the caricature of a work of art³⁵.

“Derogatory action in relation to the work” appears to refer to something other than changes in the work itself. Examples of such derogatory action include “the publication of a book with an offensive jacket cover, the production of a serious play in a manner that derides the author or his views, the reproduction of an artistic work in juxtaposition with pornographic material”³⁶.

“Prejudice to the honour or reputation of the author”: The wording in the Convention is taken to mean that the changes to an author’s work have to be prejudicial to his honour and reputation³⁷. This requirement has been regarded as setting an objective test. Nevertheless, delegates at the Brussels Conference 1948 sought to define the scope of “honour or reputation”; the general consensus was that any change should not just be prejudicial to a person’s reputation as an author but as a man (or woman) as well³⁸. The wording also implies that the test of what will constitute a modification or derogatory treatment of the work is subjective.

³⁴ Berne Convention 1971, Article 6bis(1).

³⁵ See Ricketson and Ginsburg at p.602.

³⁶ See Ricketson and Ginsburg at pp. 603-04.

³⁷ “The concepts of ‘distortion’ and ‘mutilation’ appear highly subjective. However, the expression ‘other modifications’ is quite neutral, and must therefore cover any change to the work that does not fall within the scope of a ‘distortion’ or ‘mutilation’. In any case, a limitation on the scope of the composite expression ‘distortion, mutilation or other modification’ is imposed by the objective requirement that these changes must be prejudicial to the honour or reputation of the author”, Ricketson and Ginsburg at p.602.

³⁸ “The author should be protected as a writer just as much as in his capacity as a personality on the literary scene. This is why you have added that he may object to any other action, implying by this any action likely to be prejudicial to the man, as a result of the distortion of his work”, *Documents de la Conférence de Bruxelles*, Brussels, 1948 (Bureau

Under the CDPA 1988, the author's moral rights can be waived by an instrument in writing signed by him³⁹. They cannot however be assigned⁴⁰. The duration of moral rights is the same as that of copyright⁴¹, namely the right of the author plus seventy years.

The author of a copyright literary, dramatic, musical or artistic work and the director of a copyright film have the right to be identified as the author or director of the work⁴². The right can only be exercised where some form of exploitation has taken place⁴³. Any reasonable form of identification can be used⁴⁴. The identification must be clear and reasonably prominent; consequently, identification in small print or in a non-apparent position may not suffice. Section 77(2)-(8) lists a number of acts that can infringe the right.

A controversial condition imposed by the Copyright Designs and Patents Act 1988 is that the author or director must formally assert his right of identification in order to exercise it⁴⁵. The right can either be asserted on an assignment of copyright or by some other instrument in writing which must be brought to the attention of the person to be made liable. The right is subject to a number of exceptions⁴⁶.

Section 84 of the CDPA 1988 provides for protection against false attribution, as a right distinct from that of paternity. There are no statutory exceptions to the right. Section 84(2)-(7) sets out an exhaustive list of acts that will be held to infringe the author's right.

de l'Union Internationale pour la Protection des Oeuvres Littéraires et Artistiques, Berne, 1951) at pp.97-98.

³⁹ CDPA 1988, section 87(2).

⁴⁰ CDPA 1988, section 22.

⁴¹ CDPA 1988, section 86.

⁴² CDPA 1988, section 77(1). The Act grants two other moral rights, namely the right against false attribution (section 84, considered in Chapter 3) and the right of privacy concerning certain photographs and films (section 85, beyond the scope of the thesis).

⁴³ For example, in the case of commercial exploitation of a work, the author has to be identified on each and every copy (CDPA 1988, section 77(7)(a)).

⁴⁴ CDPA 1988, section 77(8). Note that if the author (or director), in asserting his rights, specifies a pseudonym, initials or some other particular form of identification, that form must be used.

⁴⁵ CDPA 1988, section 78(2).

⁴⁶ CDPA 1988, section 79.

The author's integrity right is defined in section 80 of the CDPA 1988 as the right of the author not to have his work subjected to derogatory treatment. Unlike the case of the paternity right, there is no statutory requirement that this right must have been asserted as a prerequisite to its exercise. However, as with the right of paternity, the right only applies in relation to a work in which copyright subsists.

"Treatment" of a work means "any addition to, deletion from or alteration to or adaptation of the work"⁴⁷. Treatment applies to any part of the work, and does not need to be done in relation to a substantial part of it⁴⁸.

A treatment of a work is derogatory if it amounts to "distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director". A distortion of a work involves "some form of twisting or perversion"⁴⁹ of it, while mutilation involves "some form of cutting or destruction"⁵⁰ of the work⁵¹. Effectively, any derogatory treatment of the work that has taken place must be prejudicial to the author's honour or reputation. It is suggested that "reputation" sets an objective standard "referring to what is generally said or believed about a person" whereas "honour" is more associated with "respect for a person and his position"⁵². The intention of the person subjecting the work to derogatory treatment is irrelevant. Section 81 sets out a list of exceptions to the right.

⁴⁷ CDPA 1988, section 80(2)(a). Section 80(2)(a)(i) and (ii) provides a list of exceptions to the right, which includes "a translation of a literary or dramatic work" and "an arrangement or transcription of a musical work involving no more than a change of key or register".

⁴⁸ *Morrison Leahy Music Ltd. v. Lightbond Ltd.* [1993] E.M.L.R. 144 (making of new recording by taking short "snatches" of songs and slightly changing the original songs' lyrics was "treatment") and *Tidy v. Trustees of the Natural History Museum* (1995) 39 I.P.R. 501 (scaling down of plaintiff's cartoons and altered background colour was "treatment").

⁴⁹ See, Garnett, K., Davies, G. and Harbottle, G., *Copinger and Skone James on Copyright* (15th ed., Sweet & Maxwell, 2005), at pp. 644-48.

⁵⁰ However, a private act of destruction apparently cannot infringe the right because the right can only be infringed if certain specified actions are done in relation to the derogatory treatment. For a list of such "specified" acts see, Copyright Designs and Patents Act 1988 section 80(3), (4), (5) and (6).

⁵¹ *Humphreys v. Thomson & Co. Ltd* [1905-10] Mac.C.C. 148 (cuts, additions and alterations in the name of characters of the work due for a serial publication, were injurious to the author's reputation), *Frisby v. British Broadcasting Corp.* [1967] Ch. 932 (omission of a few words from a play was capable of weakening its structure).

⁵² See Garnett, K., Davies, G. and Harbottle, G., *Copinger and Skone James on Copyright* (15th ed., Sweet & Maxwell, 2005), at p. 647.

UNITED STATES OF AMERICA
GENERAL PRINCIPLES
OF LAW

Before the passing of VARA there was no general federal statutory protection of the author's rights of paternity and integrity. Instead, these rights had been stated as being available under general principles of law⁵³, for example, contract, defamation, and misrepresentation, unfair competition and privacy⁵⁴.

In 1985, Roberta Kwall noted that “the increasingly liberal applications of unfair competition law generally and section 43(a) of the Lanham Act in particular⁵⁵” did in effect protect authors’ moral rights. This observation was anchored in the Second Circuit’s 1976 decision in *Gilliam v. American Broadcasting Companies*⁵⁶; members of Britain’s Monty Python comedy troupe sought to stop ABC from broadcasting shortened versions of the Monty Python Flying Circle shows. Monty Python’s claims concerned allegations of copyright infringements, breach of contract and unfair competition claims. The Court concluded that Monty Python had a cause of action under the Lanham Act, stating that while “American copyright law, as presently written, does not recognize moral right”⁵⁷ ABC’s editing “mutilated the original work and that consequently the broadcast of those programs as the creation of Monty Python violated the Lanham Act”⁵⁸, Judge Lumbard reasoning that ABC had “represented to the public as the product of appellants what was actually a mere caricature of their talents”⁵⁹.

Subsequently, the Supreme Court in *Dastar Corporation v. Twentieth Century Fox Film Corporation*⁶⁰ was called to establish the scope of section 43(a) of the Lanham Act regarding a previously copyright work that had fallen in the public domain. The Court offered an interpretation of “origin” in section 43(a): “the most natural understanding of the ‘origin’ of ‘goods’ ... is the producer of the tangible product

⁵³ See, *Gilliam v. American Broadcasting Companies*, 538 F.2d 14 (2nd Cir. 1976) (protection against editing of Monty Python film). Cf. *Dastar Corp. v. Twentieth Century Fox Film Corp. et al* 123 S. Ct. 2041 (June 2, 2003), on re-hearing C.D.Cal. 68 USPQ 2d 1538 (October 14, 2003).

⁵⁴ See Sterling at p.351.

⁵⁵ Kwall, R., “Copyright and the Moral Right: Is An American Marriage Possible?” (1985) 38 Vand. L. Rev. 1, at 18. See also, Hughes, J., “The Philosophy of Intellectual Property” (1988) 77 Geo. L. J. 287 (discussing how moral rights-like protection might be provided under a compendium of common law causes of action).

⁵⁶ 538 F. 2d 14 (2nd Cir. 1976).

⁵⁷ 538 F. 2d at 23.

⁵⁸ 538 F. 2d at 24.

⁵⁹ 538 F. 2d at 29.

⁶⁰ 123 S. Ct. 2041 (June 2, 2003).

sold in the marketplace and as used in the Lanham Act, the phrase 'origin of goods' is in our view incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody or contain"⁶¹. The importance of the Dastar case lays in its unanimous decision that vis-à-vis works in the public domain, there is no Lanham Act obligation to credit the original creator or copyright owner as the "origin" of the work. In view of the Dastar decision, the strength of the Gilliam case as supporting claims of moral rights under the Lanham Act is under discussion.

VARA 1990

The passing of the Visual Artists Rights Act 1990, inserting s.106A in the Copyright Act 1976, marked an important development in the recognition of the author's moral rights under Federal law. The Act amended the US Copyright Act 1976 and guarantees certain rights for authors of works of visual art.

Under VARA, moral rights automatically vest in the author of a work of visual art. For the purposes of VARA, visual art includes paintings, drawings, prints, sculptures and photographs, existing in a single copy or a limited edition of 200 signed and numbered copies or fewer. VARA only protects works of recognised stature: posters, maps, globes, motion pictures, electronic publications, and applied art are among the categories of visual works explicitly excluded from VARA protection. A general comment is therefore that these federal statutory moral rights are only available for specific categories of artistic works, not copyright works in general.

[PATERNITY]

The author of a work of visual art is guaranteed the right of paternity. Under the Act, the paternity right embraces the author's right to:

- a) claim authorship of the work⁶²,
- b) prevent false attribution of authorship⁶³, and
- c) prevent use of the author's name as the author of the work where such work is prejudicially distorted, mutilated or modified⁶⁴

⁶¹ 123 S. Ct. at 2047.

⁶² 1976 US Copyright Act, section 106A(1)(A).

⁶³ 1976 US Copyright Act, section 106A(1)(B)

⁶⁴ 1976 US Copyright Act, section 106A(a)(2).

[INTEGRITY]

The author's integrity right safeguards the author's right to prevent intentional distortion, mutilation etc. of the work which is prejudicial to the author's honour or reputation⁶⁵. An interesting feature of the author's integrity right is the Act's express provision relating to the destruction of a work: the author has the right to "prevent any destruction of a work of recognised stature, and any intentional or grossly negligent destruction of that work"⁶⁶.

Section 106A(c) of the Act provides for a number of limitations on the author's integrity right, including the following:

- The modification of a work that results from the passage of time, the inherent nature of the materials or of failed conservation efforts does not violate VARA⁶⁷. The Act does not hold a party liable for damaging an artist's work if such damage is the result of negligence⁶⁸.
- The modification of a work that results from conservation or the public presentation of the work does not violate VARA unless such modification is caused by gross negligence⁶⁹. Thus an inferior quality reproduction of the artist's work in a pamphlet would not, unless resulting from such negligence, constitute an infringement of the author's moral right of integrity⁷⁰.
- VARA does not protect works "made for hire"⁷¹.

FRANCE

Under the French Intellectual Property Code, the author's right of respect embraces both the rights of paternity and integrity⁷². The author's moral rights are perpetual, inalienable and imprescriptible⁷³.

⁶⁵ 1976 US Copyright Act, section 106A(a)(3)(A).

⁶⁶ 1976 US Copyright Act, section 106A(a)(3)(B).

⁶⁷ 1976 US Copyright Act, section 106A(c)(1).

⁶⁸ See, *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525 (1996). The case involved two artists who lost much of their lives' work after a City garbage truck, parked at the top of a hill, rolled down and crashed their studio. The artists recovered damages in tort, but not for a violation of the California Act, which, like VARA, excludes liability for damages caused by gross negligence. The court added that even if the California Act did allow recovery for negligence, VARA would have pre-empted such recovery.

⁶⁹ 1976 US Copyright Act, section 106A(c)(2).

⁷⁰ See, *Pavia v. 1129 Ave. of Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1994).

⁷¹ 1976 US Copyright Act, section 106A(c)(3).

⁷² French Intellectual Property Code 1992, article L.121-1.

⁷³ French Intellectual Property Code 1992, article L.123-1.

[PATERNITY] The right of paternity embraces both the author's right to be acknowledged as the author of a work and his right against false attribution. The right has been found to have been infringed where the author was falsely described as a "co-author" when he was in fact the sole author⁷⁴.

[INTEGRITY] The author's integrity right is not specifically described under article L.123-1. The Berne Convention's requirement that any derogatory action should be prejudicial to the author's honour or reputation is notably absent⁷⁵. It thus appears that, as a general rule, French courts will look at the author's view to determine whether the action complained of was indeed derogatory; they will consider whether the allegedly derogatory act is made to "denature the ethic of the work"⁷⁶.

GERMANY Under the statutory provisions of the 1965 Law, the author's moral rights shall be protected for the same period of time as his economic rights, namely they expire seventy years after the death of the author⁷⁷.

[PATERNITY] The paternity right of the author is safeguarded under article 13 of the Author's Right and Related Protection Rights Law 1965. The right appears to be two-fold in nature. It embraces the author's positive right to claim authorship of his work as well as the negative right to take action against usurpation of authorship by third parties⁷⁸.

⁷⁴ See, *Ophals v. Agence France Presse*, TGI Paris, 1ère ch., May 5, 1999: (2002) 183 R.I.D.A. 345.

⁷⁵ For a detailed examination, see Lucas, A., and Lucas, H.J., *Traité de la Propriété Littéraire et Artistique* (2nd ed, Litec, 2001) at pp.366-427.

⁷⁶ See, *Chaplin v. Chatelus*, TGI Paris, January 24, 2000: (2000) 186 R.I.D.A. 305. Also, see "Dali costumes" (accessories added to costumes designed by Dali did not infringe the moral right as they did not distort the spectator's judgment) Cass., March 5, 1968, D. 1968, 382; "Godot" (moral rights infringed, when after the death of the author and against his wish, roles were played by male as well as female actors) TGI Paris, October 15, 1992: (1993) 155 R.I.D.A. 225; *Schoendoerffer v. Mod Films* (moral right of director infringed when the duration of his film was reduced without his consent) TGI Paris, March 23, 1994: (1995) 164 R.I.D.A. 401; *Scrive v. Rennes* (infringement of moral right as fountain designed for and placed in the hall of a commercial centre was dismantled by the proprietor alleged risk to customers) C.A. Paris, July 10, 1975, D. 1977.342: (1997) 91 R.I.D.A. 114. For an extensive list of cases, see Sterling at pp. 358-363.

⁷⁷ Author's Right and Related Protection Rights Law 1965, article 64.

⁷⁸ See Sterling at p.347.

[INTEGRITY]

Article 14 of the German law recognises the author's right of integrity as the author's right to "prohibit any distortion or any other mutilation of his work which would jeopardize his legitimate intellectual or personal interests in the work"⁷⁹. The test for assessing infringement of this right is an objective one, as is the case under the Berne Convention⁸⁰. Under article 39(2) of the Author's Right and Related Protection Rights Law 1965, a licensee shall be allowed to make alterations in the work provided the author could not have in good faith refused them. This provision appears to enhance the objective element of the test for the right's infringement.

1.3.2.4 ECONOMIC RIGHTS

Economic rights are those rights that give the author the opportunity to control and participate in the benefits of the commercial and/or financial exploitation of his work. In general, they are exclusive in nature since the copyright owner alone can authorise and/or prohibit the carrying out of the specific acts.

There are four main types of economic rights, namely the right of reproduction, adaptation, distribution and communication of a work to the public⁸¹.

REPRODUC-
TION RIGHT

The right of reproduction refers to the action of making a copy or to the copy produced by the act of reproduction.

On the international level, the right was written in the Berne Convention during the 1967 Stockholm Revision⁸²; Article 9(1) provides that "authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form". The scope of the right is

⁷⁹ See "*Oppenheimer*" (moral right infringed by frequent and relatively long comments interrupting a play) OLG Munich, April 15, 1971; "*Maske in Blau*" (moral right infringement as the modern version of an operetta involved deletions from original script, insertions of film and other composers music) BGH, April 29, 1970: (1971) G.R.U.R. 35. For an extensive list of cases, see Sterling at pp. 359-363.

⁸⁰ Under Article 6bis(2) of the Convention, the author must prove that his honour or reputation has been prejudiced.

⁸¹ In examining the relationship between the author's economic rights and the individual's right of freedom of expression, the thesis focuses on the right of reproduction (which can be said to cover, to an extent, the right of communicating a work to the public). For this analysis, see Chapter 4.

⁸² According to Ricketson and Ginsburg at p. 622, the reason for the delay of the reproduction right's incorporation into the Convention was the lack of agreement on the right's scope and content.

further defined in Article 9(3) “any sound or visual recording shall be considered as a reproduction for the purposes of this Convention”.

National legislations define the right in equally broad terms as the Berne Convention. The UK CDPA 1988 defines “copying” as “reproducing the work in any material form”⁸³. The US Copyright Act 1976 grants the exclusive right to reproduce a copyrighted work in “copies or phonorecords”⁸⁴. The French Intellectual Property Code 1992 relies on broad language defining reproduction as the material fixation of a work by any process and adding illustrative examples, including mechanical film or magnetic recording⁸⁵ while the German author’s right law defines it as “the right to make copies of the work by whatever method and in whatever quantity”⁸⁶.

Reproduction will be in material form (in the same or different mediums) and its content can be literal or non-literal⁸⁷. Such material form includes storage in an electronic medium⁸⁸. However, as a result of the development of contemporary technologies for the transmission of works protected by copyright/author’s right, there is the as yet unanswered question relating to the duration of the reproduction. In other words, should the right encompass ephemeral copies made in the digital network, or should there be a level of duration of retention, and if so, what should that level be? Even though no agreement has been reached on an international level on this issue, a proposal that would have supported the inclusion of ephemeral copies within the scope of the reproduction right was dropped by the 1996 WIPO Diplomatic Conference⁸⁹.

⁸³ CDPA 1988, section 17.

⁸⁴ US Copyright Act 1976, section 106(1). The Act defines both copies and phonorecords in section 101. Copies are stated to be “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device”. Phonorecords are “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device”.

⁸⁵ French Intellectual Property Code 1992, article L.122-3.

⁸⁶ Author’s Right and Related Protection Rights Law 1965, article 16(1).

⁸⁷ Literal reproduction is that reproduction which will not change the basic format of the original work, while non-literal reproduction can be the encoding, adaptation or translation of the original work. For a detailed discussion, see Sterling at p. 179-80.

⁸⁸ See, WIPO Copyright Treaty Agreed Statement Concerning Article 1(4).

⁸⁹ The Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (Geneva, December 2-20, 1996) rejected a draft proposal (proposed Article 7) on this issue

ADAPTATION
RIGHT

The right of adaptation relates to the author's right to control transformation of his work into another type of presentation – for example, by translation, by changing a story into a play or a popular song into an orchestral arrangement. Article 8 of the Berne Convention, one of the first provisions to be included as a minimum requirement, ensures the author's right "of making and of authorising the translation of their works". Furthermore, Article 12 of the Convention provides that the authors of literary or artistic works "shall enjoy the exclusive right of authorising the adaptations, arrangements and other alterations of their works"⁹⁰.

Some countries, such as France⁹¹ and Belgium, treat the adaptation right as an aspect of the reproduction right, while others, such as the United Kingdom⁹² and Japan⁹³ recognize it as a distinct economic right. It could therefore be said that the adaptation right (where the adaptation is recorded) overlaps with that of reproduction in that all adaptations involve reproduction where the essential features of the adapted work are used. In addition, the right can sometimes overlap with the moral right of integrity which similarly empowers authors to control certain alterations in their work.

to be included in what came into being as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The titles of the relevant documents are *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works* (August 30, 1996, WIPO Document CRNR/DC/4), and *Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights of Performers and Producers of Phonograms* (August 30, 1996, WIPO Document CRNR/DC/5).

Replying to the question of ephemeral copies, the Diplomatic Conference stated that "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention" (WIPO Document CRNR/DC/96, Concerning Article 1(4), Dec. 23, 1996).

See generally, Gendreau, Y. "The Reproduction Right and the Internet" (1998) 178 R.I.D.A. 2, and Vinje, T., "The New WIPO Copyright Treaty: A Happy Result in Geneva" (1997) 19 E.I.P.R. 230.

⁹⁰ For a more detailed discussion, see Ricketson and Ginsburg at pp. 645-56.

⁹¹ French Intellectual Property Code 1992, articles L.122-1, 122-4.

⁹² CDPA 1988, section 16(1)(e). There are similar provisions in other Commonwealth legislation.

⁹³ Copyright Act 1970, article 27.

DISTRIBUTION RIGHT The distribution right relates to the author's right to control dissemination of physical copies of his work. The WIPO Copyright Treaty 1996⁹⁴ introduced a broad distribution right for literary and artistic works. Even though not all countries recognise the right, the States of the EC⁹⁵, the United Kingdom⁹⁶, Germany⁹⁷ and the United States⁹⁸ are some of the countries that do provide for a comprehensive distribution right.

In recent years, advances in the reproduction technologies that facilitate copies of motion pictures, phonograms and, in some instances, computer software, have led to the need to protect rental rights. The TRIPS Agreement⁹⁹ and the WIPO Copyright Treaty¹⁰⁰ have introduced certain rental rights. On a regional level, rental rights are established under the 1992 EC Rental/Lending and Related Rights Directive, NAFTA and Cartagena Decision 351.

COMMUNICATION TO THE PUBLIC RIGHT The author's right of communicating his work to the public has traditionally encompassed a variety of activities, including giving a performance of the work in public or communicating the work through intangible means such as wireless or cable transmission.

The definition and thus potential scope of the right has nevertheless generated world-wide debate for a number of reasons. Firstly, the requirement underpinning all formulations of the right –i.e. that the exploitation of the work must be in public, and in particular the meaning of the word “public”- has given rise to extensive national debates. Although at present there is a general consensus that “public” excludes the group of persons within the purely domestic circle¹⁰¹, there are still variations in the interpretation of the term “public” among various countries¹⁰².

⁹⁴ Article 6(1).

⁹⁵ Information Society Directive 2001, Article 4.

⁹⁶ CDPA 1988, section 18.

⁹⁷ Author's Right and Related Protection Rights Law 1965, article 17(1).

⁹⁸ US Copyright Act 1976, section 106(3).

⁹⁹ Article 14(4).

¹⁰⁰ Articles 7(1) and 7(3).

¹⁰¹ See, French Intellectual Property Code 1992, article L.122-5, Author's Right and Related Protection Rights Law 1965, article 15(3). The US Copyright Act 1976 defines, in section

Secondly, the emerging communication technologies and, in particular, the Internet, that enable individuals to receive performances of works on demand in the privacy of their homes have raised new and complicated questions about the meaning of “public”¹⁰³. The advent of the Internet not only further entangles the definition of “public” but also greatly complicates the determination of the place where the communication takes place.

There is a lack of uniformity in the granting of this right among national legislations¹⁰⁴. Some laws grant the general right of communicating the work publicly¹⁰⁵ while others employ specific terms such as rights of public performance and broadcasting¹⁰⁶.

It appears that an equal level of diversity exists among different international instruments. The Universal Copyright Convention 1952 prescribes the exclusive right of the author to control “public performance and broadcasting”¹⁰⁷, while the

101, “perform or display a work publicly” as “to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances are gathered”.

¹⁰² An example of such variations occurs in the case of reception in hotel rooms. There is a lack of uniformity among national case law as to whether transmission of films, video and radio programs by the hotel proprietor to guests in their room would constitute ‘making available to the public’ and thus an infringement. For a detailed analysis and examples of relevant national case law, see Sterling at pp. 374-75.

¹⁰³ For a detailed discussion of the right of communication see Makeen, M.F., *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK and French Law* (Kluwer Law International, 2000), Chapter 6, and generally Burrell, R. and Coleman, A., *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005), Chapter 7.

¹⁰⁴ For discussion of the historical development of the right under national laws see Makeen, M.F., *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK and French Law* (Kluwer Law International, 2000), Chapters 1 (UK), 2 (USA) and 3 (France).

For discussions of the right under national laws see Bently, L. and Cornish, W.R., “United Kingdom”, Schwartz, E.J. and Nimmer, D., “United States”, Lucas, A. and Kamina, P., “France” and Dietz, A., “Germany” in Nimmer, M.B. and Geller, P.W., *International Copyright Law and Practice* (Matthew Bender, 1988-) at para. 8[1][b].

¹⁰⁵ For example, Author’s Right and Related Protection Rights Law 1965, article 15(2); French Intellectual Property Code 1992, article L.122-2. The US could be said to belong to this category of national laws as, while it assimilates wireless broadcasting and cable transmission to its public performance right (US Copyright Act 1976, section 106(4)), it also grants a separate public display right (US Copyright Act 1976, section 106(5)).

¹⁰⁶ For example, Canadian Copyright Act, section 3(1), CDPA 1988, section 16.

¹⁰⁷ Universal Copyright Convention 1952, Article IVbis(1).

Berne Convention 1971 grants the separate rights to perform¹⁰⁸, recite¹⁰⁹ and broadcast.

1.3.2.5 LIMITATIONS AND EXCEPTIONS

Limitations to copyright law appear under the diverse headings of permitted acts, restrictions, exceptions and limitations according to the legal background and culture of the jurisdiction in which they developed. Such restrictions are primarily designed to balance the interests of the copyright owner against the public interest, pressing social and cultural needs and, commercial issues¹¹⁰.

Limitations to copyright law are provided for on the international, regional and national levels. The Berne Convention sets out a number of such exceptions that can apply to curtail the exclusive rights vested in the author of a work. In addition to allowing for specific limitations¹¹¹, Article 9(2) of the Berne Convention, in conjunction with Article 13 of the TRIPS Agreement 1994, provide for the so-called 'three-step test'¹¹², which in general governs the way in which existing limitations are to apply and the way in which new ones can be implemented by national legislatures.

For the purposes of the thesis, on the national level, the limitations of fair dealing/fair use and the public interest aspect constitute areas of importance¹¹³; they are employed to illustrate the role of limitations in the context of the relationship between copyright and freedom of expression. Accordingly, these

¹⁰⁸ Berne Convention 1971, Article 11.

¹⁰⁹ Berne Convention 1971, Article 11*ter*.

¹¹⁰ For an in-depth discussion of current limitations and exceptions to copyright, see ALAI Study Days Documents, Cambridge 1998, *The Boundaries of Copyright – Its Proper Limitations and Exceptions* (Australian Copyright Council, 1999).

¹¹¹ For a general discussion of the limitations provided under the Berne Convention, see para. 4.3.

¹¹² "It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

¹¹³ For a discussion of copyright exceptions see Burrell, R. and Coleman, A., *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005), Chapters 2 and 4.

exceptions and their repercussions, actual and potential, on interaction of the rights are examined in detail in the thesis¹¹⁴.

1.3.2.6 DURATION OF PROTECTION

Copyright has traditionally been granted to authors for a limited period of time mainly on policy grounds: to safeguard the right of the public to have access to works.

Following the Brussels Diplomatic Conference in 1948, the Berne Convention incorporated the provision that the term of copyright “shall be the life of the author and fifty years after his death”¹¹⁵. However, in some European countries the duration of protection exceeded life plus fifty years (as is permissible under the Berne Convention). In order to achieve uniformity, in 1993, the Term Directive harmonized the term of copyright protection to the life of the author and seventy years after his death¹¹⁶, subject to reciprocity in the case of non-EU/EEA works. The justification provided in the Preamble of the Directive reads as follows: “The Commission stresses the need to harmonise copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and stresses that their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole”¹¹⁷.

Statutory provisions within national jurisdictions, in uniformity with the Term Directive, specify for the term of protection of the author’s copyright to be for his life

¹¹⁴ See paras. 5.2 (fair dealing/fair use and freedom of expression/free speech) and 5.3 (public interest and freedom of expression).

¹¹⁵ Berne Convention 1971, Article 7(1).

The comparison of terms test under Article 7(8) of the Berne Convention, as applying to duration of protection, is one of the permissible exceptions to the national treatment rule of Article 5(1) of the Convention.

¹¹⁶ Term Directive 1993, Article 1(1).

A proposal by the World Intellectual Property Organisation (WIPO) to extend the term of protection for authors to seventy years after their death in the form of an additional Protocol to the Berne Convention (Memorandum of the International Bureau of WIPO on Questions concerning a possible Protocol to the Berne Convention, Doc. BCP/CE/II/3, October 1991) was rejected by the Assembly of the Berne Union on September 19, 1992. For a detailed discussion, see Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002).

¹¹⁷ Term Directive 1993, Preamble, recital 10.

and seventy years after his death¹¹⁸. The United States of America has also extended the term of protection for the author by 20 years thus meeting the 70 years period of European instruments¹¹⁹, and avoiding the imposition in the EC of the lesser term for US works.

The issue of how long the copyright term should last for has been a controversial issue¹²⁰. On the one hand, partisans of perpetual rights argue for an even longer term of protection which will enhance the position of copyright owners; on the other, extension of the term has been met with opposition: "...one may be concerned that term extension will result in an overall weakening of copyright protection... one may fear that 'user rights' advocates will contend, and courts will agree, that copyright now endures for so long a time, that the subsisting (and excessive) period of exclusivity must be tempered by more vigorous exceptions to copyright protection"¹²¹.

1.4 GENERAL OVERVIEW: MULTILATERAL TREATIES AND REGIONAL INSTRUMENTS

1.4.1 MULTILATERAL TREATIES

1.4.1.1 GENERAL

The following paragraphs provide a brief description of the multilateral copyright treaties relevant to the thesis. These instruments primarily relate to authors rights and are employed throughout the thesis in the context of its comparative approach in examining the relationship of copyright and freedom of expression on the international level.

The multilateral treaties discussed are as follows:

- The Berne Convention 1971

¹¹⁸ See, United Kingdom: CDPA 1988, sections 12(1)-(3); France: Intellectual Property Code 1992, article L.123-1; Germany: Author's Right and Related Protection Rights 1965, article 67.

¹¹⁹ The Sonny Bono Copyright Term Extension Act, Pub.L.No.105-298, 112 Stat.2827 (1998). Also, see *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹²⁰ This issue and its importance in the context of the relationship between copyright and freedom of expression are further examined in para. 5.5.

¹²¹ Ginsburg, J.C., "News from US (I)", (1999) 179 R.I.D.A. 143.

- The TRIPS Agreement 1994, and
- The WIPO Copyright Treaty 1996

1.4.1.2 BERNE CONVENTION 1886 - 1971

The Berne Convention for the Protection of Literary and Artistic Works is the oldest international copyright convention. Since its adoption in 1886, it has been revised on a number of occasions.

The Convention provides for certain minimum rights for authors of literary and artistic works¹²²; it guarantees authors a number of economic¹²³ and moral rights¹²⁴ and national treatment¹²⁵. The term of protection is fixed at the author's life plus fifty years.

1.4.1.3 TRIPS AGREEMENT 1994

The TRIPS Agreement closely follows the Berne Convention and sets international standards for intellectual property rights, including both copyright and related rights¹²⁶.

Authors of literary and artistic are protected under Article 9 of the Agreement for the same term as is provided under the Berne Convention¹²⁷.

TRIPS provides authors with the same economic rights as the Berne Convention¹²⁸. However, it absolves Member States from the obligation of implementing the moral rights provisions as specified in Article 6*bis* of the Convention¹²⁹.

The Agreement contains provisions regarding the enforcement of intellectual property rights¹³⁰ as well as dispute prevention and resolution procedures¹³¹.

¹²² Berne Convention 1971, Article 1.

¹²³ The economic rights include the rights of translation (Article 8), reproduction (Article 9), public performance (Article 11) and adaptation (Article 12).

¹²⁴ The moral rights include the rights of paternity and integrity (Article 6*bis*).

¹²⁵ Berne Convention 1971, Article 5(1).

¹²⁶ The related rights aspects of the Agreement are not examined in the context of the thesis.

¹²⁷ TRIPS Agreement 1994, Articles 9 and 12.

¹²⁸ TRIPS Agreement 1994, Articles 9, 11 and 14(3).

¹²⁹ TRIPS Agreement 1994, Article 9(1).

1.4.1.4 WIPO COPYRIGHT TREATY 1996

Member States of the WIPO Copyright Treaty have to comply with the substantive provisions of the Berne Convention¹³².

The Treaty covers authors of literary and artistic works¹³³ for a term of the author's life plus fifty years¹³⁴, and confers upon them the same economic and moral rights as are provided under the Berne Convention¹³⁵.

The Treaty also makes provision for new rights for authors¹³⁶, while it contains obligations concerning technological measures¹³⁷ and protection of rights management information¹³⁸.

1.4.2 REGIONAL COPYRIGHT INSTRUMENTS

1.4.2.1 EUROPE

It can be said that, to date, there is no single regional copyright instrument within the European Community. Authors rights are generally safeguarded through the statutory provisions of a number of Directives. The Directives cover various copyright-related issues, such as the term of protection¹³⁹ and authors rights in the information society¹⁴⁰. The relevant provisions of these Directives are the subject of consideration in the thesis.

¹³⁰ TRIPS Agreement 1994, Part III. Article 41 provides that "Members shall ensure that enforcement procedures ... are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements".

¹³¹ TRIPS Agreement 1994, Part V.

¹³² WIPO Copyright Treaty 1996, Article 1.

¹³³ WIPO Copyright Treaty 1996, Articles 4-8.

¹³⁴ WIPO Copyright Treaty 1996, Articles 1(4) and 9 (full term for photographic works).

¹³⁵ WIPO Copyright Treaty 1996, Articles 1(4) and 6-8.

¹³⁶ WIPO Copyright Treaty 1996, Article 8 (right of communication to the public by wire or wireless means).

¹³⁷ WIPO Copyright Treaty 1996, Article 11.

¹³⁸ WIPO Copyright Treaty 1996, Article 12.

¹³⁹ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

¹⁴⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

Other EC Directives concern the protection of databases, computer programs, the author's resale right and rental and lending rights. Such Directives are not directly associated with the present work.

1.4.2.2 NORTH, CENTRAL AND SOUTH AMERICA

The relevant regional American instruments that shall be referred to in subsequent chapters are the North American Free Trade Agreement (NAFTA) 1992 and the Cartagena Decision 351 1993¹⁴¹.

In general, NAFTA follows the Berne Convention and protects, among others, authors of literary and artistic works for a term of the life of the author plus fifty years¹⁴². Such authors are vested with a number of economic rights, including the right of reproduction and the right of communication of a work to the public¹⁴³. NAFTA however excludes the protection of authors moral rights, as provided for under Article 6*bis* of the Berne Convention¹⁴⁴.

The Cartagena Decision 351 protects, among others, authors and other owners of rights in works of the mind, in the literary, artistic or scientific field¹⁴⁵. The term of copyright protection is the same as under NAFTA and the Berne Convention¹⁴⁶. This instrument provides authors with both a number of economic (including, rights of reproduction, communication to the public, translation, adaptation)¹⁴⁷ and moral (including, divulgation, paternity and integrity rights)¹⁴⁸ rights.

1.4.3.3 OTHER REGIONS

The thesis also examines the African region; however, in the context of copyright, there appears to be no regional instrument in place¹⁴⁹.

Other EC Directives concern the protection of databases, computer programs, the author's resale right and rental and lending rights. Such Directives are not directly associated with the present work.

¹⁴¹ These instruments are mostly relevant in the examination of the relationship between copyright and freedom of expression on the regional (American) level. See paras. 3.4.2 (moral rights and freedom of expression) and 4.4 (economic rights and freedom of expression).

¹⁴² NAFTA, Article 1705.

¹⁴³ NAFTA, Articles 1701 and 1705(2).

¹⁴⁴ NAFTA, Article 1701.

¹⁴⁵ Cartagena Decision 351, Article 1.

¹⁴⁶ Cartagena Decision 351, Article 18.

¹⁴⁷ Cartagena Decision 351, Articles 13-16.

¹⁴⁸ Cartagena Decision 351, Article 11.

¹⁴⁹ For a discussion of the regional human rights instrument, see para. 2.4.4.

1.5 HISTORICAL BACKGROUND: NATIONAL LAWS

1.5.1 GENERAL

This section examines in more detail the development of national copyright and author's right systems. It discusses the historical background of the adoption of legislative instruments safeguarding the author's copyright.

The process of formation of the first national copyright laws can be said to constitute evidence of each jurisdiction's subsequent approach to this area. Legal history has shaped, to an extent, the copyright landscape of the present times and can thus be employed as a tool to comprehend the current diversities and similarities among national copyright legislations.

Accordingly, the following paragraphs briefly examine the development of the copyright laws of those countries that are of primary importance in the comparative approach of the thesis. The relevant countries include:

- The United Kingdom,
- The United States of America,
- France, and
- Germany

1.5.2 UNITED KINGDOM LAW

The first UK Act recognising the right of the author to authorise the reproduction of his work was the Statute of Anne 1710¹⁵⁰. The Act remained in force effectively until the major revision Copyright Act of 1842¹⁵¹ at a time when the issue of the period of protection was controversial. This later Act is considered to have "formed the basis of modern copyright law: it provided the groundwork for the domestic aspects of the

¹⁵⁰ Seville, C., *Literary Copyright Reform in Early Victorian England (the Framing of the 1842 Copyright Act)* (Cambridge University Press, 1999).

¹⁵¹ On the background to and history of the passing of the 1710 Act, see Deazley, R., *On The Origin of the Right to Copy* (Hart Publishing, 2004), Chapters 1 and 2. Other Acts were passed which extended the term and scope of rights granted to authors. For a more detailed discussion, see Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, London, 2002) at pp.28-32; Dworkin, G., "United Kingdom" in *International Copyright and Neighbouring Rights* (Stewart, S.M. and Sandison, H. (eds.), 2nd ed., Butterworths, 1989), Chapter 18; Sherman, B. and Bently, L., *The Making of Modern Intellectual Property Law* (Cambridge University Press, 2002) at pp.111-28.

1911 Act, and this foundation was to a significant extent carried forward in the 1956 and 1988 Acts"¹⁵².

Until the passing of the Copyright Act 1911, a number of legislative amendments were made. The Act brought about several reforms partly in order to comply with the Berlin Revision of the Berne Convention (1908)¹⁵³ – it codified the law, extended the term of protection to meet the Berne Convention standard, and introduced the requirement of originality.

The 1911 Act remained in operation until the Copyright Act 1956 came into force on July 1, 1957. The 1956 Act was in turn repealed by the Copyright, Designs and Patents Act 1988. Since the 1988 Act came into force, its provisions have been amended on a number of occasions in order to implement the European Community Directives in the field of copyright and related rights.

1.5.3 UNITED STATES OF AMERICA LAW

The fountainhead of intellectual property protection in the United States is the US Constitution itself, which empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings"¹⁵⁴.

The first copyright statute in the United States was the Act of May 31, 1790. General revisions of the copyright law were effected in the statutes of 1891 (protecting works originating outside the United States), 1909 and 1976.

The Act of October 19, 1976 completely reformed the 1909 Act. The new Act abolished the old dual system whereby Federal statutory protection was extended to published material while common law protection under State law existed for

¹⁵² Seville, C., *Literary Copyright Reform in Early Victorian England (the Framing of the 1842 Copyright Act)* (Cambridge University Press, 1999) at pp.6-7.

¹⁵³ For an analytical discussion, see Sterling, J.A.L. and Carpenter, M.C.L., *Copyright Law in the United Kingdom and the Rights of Performers, Authors and Composers in Europe* (Legal Books, 1986, supplement 1987), chapter 1.

¹⁵⁴ US Constitution 1787, Article 1, section 8. For a discussion of the development of US copyright law, see Ringer, B. and Sandison, H., "United States of America" in *International Copyright and Neighbouring Rights* (Stewart, S.M. and Sandison, H. (eds.), 2nd ed., Butterworths, 1989), Chapter 21.

unpublished works. The Act established Federal dominance by pre-empting state common law copyright in works falling within the subject-matter of the Federal statute, whether published or unpublished.

The US Copyright Act 1976 has, in turn, been amended a number of times, as a result of the United States' adherence to the Berne Convention 1971, North American Free Trade (NAFTA) Agreement 1992, TRIPS Agreement 1994 and WIPO Treaties 1996.

1.5.4 FRENCH LAW

Before the French Revolution, public performance and printing were covered by royal privileges¹⁵⁵. In the wake of the French Revolution, these privileges controlling the performance and printing of authors' works were abolished¹⁵⁶.

The Decree of January 13-19, 1791 settled relations between authors and theatre impresarios by conferring upon every citizen the right to set up a public theatre and perform all kinds of works¹⁵⁷. The Decree also contained provisions relating to the performance of works both of living and dead authors¹⁵⁸.

The Decree of 19-24 July 1793 established for the first time the exclusive right of reproduction based primarily on the concept of property: "Authors of writings of every sort, composers of music, and painters and designers who engrave paintings (tableaux) or designs, shall enjoy for their whole life the exclusive right to sell, arrange sale and distribute their works in the territory of the Republic, and to assign such property in whole or in part"¹⁵⁹.

¹⁵⁵ Report of Antoine-Louis Séguier, Avocat-Général (1777). Cited in Renouard, A.C., *Traité des droits d'auteur dans la littérature, les sciences et les beaux-arts* (2 vol., Paris, Jules Renouard, 1838-1839) at p.182 (volume 1).

¹⁵⁶ Royal privileges were abolished by the Constituent Assembly on 4 August 1789.

For a discussion of the historical development of the French author's right law, see Chesnais, P., "France" in *International Copyright and Neighbouring Rights* (Stewart, S.M. and Sandison, H. (eds.), 2nd ed., Butterworths, 1989), Chapter 14; Ginsburg, J.C., "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1991) 147 R.I.D.A. 125.

¹⁵⁷ Article 1.

¹⁵⁸ Articles 2 and 3.

¹⁵⁹ Decree of 19/24 July 1793, Article 1. Translation by Sterling, J.A.L. in Sterling at p. 1260.

The few lines of the Decrees of 1791 and 1793 remained, with a number of statutory amendments, the basis of authors' protection until the Law on Literary and Artistic Property came into force on March 11, 1957.

Neighbouring rights were introduced by Parliament in the amending law of July 3, 1985¹⁶⁰.

In 1992, the 1957 Law was replaced by the Code on Intellectual Property 1992, currently in force.

1.5.5 GERMAN LAW

In Germany, Imperial privileges awarded from the beginning of the sixteenth century to printers, publishers, important artists and, in some cases, authors for protection against copying were the precursors of copyright¹⁶¹.

The concept of intellectual property developed gradually, the fragmentation of the country into different states did not aid the creation of any uniform code of protection. In a piece-meal way, local regulations came to replace the system of privileges and by the nineteenth century, Germany was faced with the need to devise a body of rules harmoniously applicable to the whole country.

The first comprehensive enactment of authors' right was the Prussian Law of 1837 for the Protection of Ownership of Works of Science and Art. The German Empire of the Laws of 1871 (literary, musical and dramatic works) and 1876 followed, the latter being replaced in 1907 by the Law on Artistic Works and Photography.

Following the adoption of the Berne Convention in 1886, the Law of 1901 (literary and musical works and a separate statute relating to publishing) was enacted. The Revision Conferences of the Berne Convention critically influenced the German law. The Berlin Act of 1908 brought about the amending law of 1910, taking into account

¹⁶⁰ Neighbouring rights are beyond the scope of the thesis.

¹⁶¹ For a general discussion of the background to the development of the German author's right system, see Ulmer, E. and von Rauscher, H.H., "Germany (Federal Republic)" in *International Copyright and Neighbouring Rights* (Stewart, M.S. and Sandison, H. (eds.), 2nd ed., Butterworths, 1989), Chapter 15.

phonograms and films for the first time. After the Revision Conference in Rome in 1928, which took broadcasting into account and introduced the “droit moral” in the text of the Conventions, the Brussels Revision of the Berne in 1948 and various studies and consultations, the Author’s Right Law of 1965 was adopted. Under this law, author’s right and related rights were distinctly differentiated while the duration of protection was extended to 70 years from the death of the author.

1.6 SUMMARY

Generally, copyright can be described as a bundle of rights. it encompasses not only the exclusive rights awarded to authors of works, but also a number of limitations and exceptions to such rights which serve to accommodate the interests of the general public. Its aim is to strike the right balance between the legal power given to authors and the larger public interest.

However, this appears to be a difficult task to accomplish given the myriads of rights that make up copyright. This difficulty is exacerbated by the diverse historical backgrounds, legal traditions and cultures that characterise international, regional and national instruments. Furthermore, modern technological advancement render it constantly necessary to update this legal area.

To date, it appears that most of these factors have been taken into account, when and as required, in developing and drafting copyright laws worldwide, while the role of copyright within international and regional markets is steadily increasing.

Nevertheless, this process has, at times, given rise to a number of concerns. There has been the argument that authors should not be given extensive protection over their creations: copyright has not been designed to create intellectual monopolies. At the heart of this issue appears to lie the general public’s right to free expression. Debates propose that copyright should be curtailed so as not to suppress individuals right to express themselves freely; alternatively, the law should be amended or enriched in such a way that freedom of expression should be taken into account vis-à-vis the author’s exclusive rights.

CHAPTER 2

The Human Right of Freedom of Expression: Its Basis and Application in Law

2.1 INTRODUCTION

The chapter maps out the international, regional and national landscapes of protection and status of the human rights, and in particular the right of freedom of expression. In outline, the following instruments (and constitutions) that recognise freedom of expression are examined at the respective levels:

International Instruments

- The Universal Declaration of Human Rights 1948
- The International Covenant on Civil and Political Rights 1966

Regional Instruments

- The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- The American Convention on Human Rights 1969
- The African Charter on Human and Peoples Rights 1981

National instruments and Constitutions

- The UK Human Rights Act 1998
- The American Declaration of 1948; the First Amendment to the US Constitution
- The French Declaration of 1789; the French Constitution of 1958; the status of the European Convention on Human Rights
- The German Constitution (Basic Law) of 1949; the status of the European Convention on Human Rights

The chapter looks at the historical background of each of the above-mentioned instruments, considering the social pressures and needs that triggered their coming into being as well as the signatory States' efforts, in the case of international and regional arrangements, to reach a consensus as to their content and scope.

The provisions on the right of freedom of expression under each instrument are analysed. The aim of this process is to define the scope of this right and the extent of the limitations placed upon it, as well as discussing the relevant jurisprudence and case law to date. Differences among international, regional and national instruments in their respective definitions, scope and interpretation of the right are thus illustrated.

The chapter provides a brief discussion of the approach that copyright itself can be considered to be a human right. The relevant human rights instruments that support this view are set out and their respective provisions studied.

In general, this Chapter sets the background to the human rights, and freedom of expression in particular, the main aspect of the subsequent comparative study of the thesis.

2.2 COPYRIGHT AS A HUMAN RIGHT

It can be argued that copyright has a dual nature. On the one hand, it is part of the legal body of intellectual property, a regime of bilateral, regional and multilateral treaties. On the other hand, the rights of intellectual property, and of copyright in particular, can be characterised as human rights.¹ The principal international document that can be said to constitutionalise human rights, and thus copyright as a human right, is the Universal Declaration of Human Rights. Article 27(2) of the Declaration provides that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which

¹ See Drahos, P., "The Universality of Intellectual Property Rights: Origins and Development" in (1999) *Intellectual Property and Human Rights*, WIPO (Geneva), 13. This paper was also presented at The Panel Discussion to Commemorate the 50th anniversary of the Universal Declaration of Human Rights, WIPO (Geneva, November 9, 1998). Also, see Ostergard, R.L., "Intellectual Property: A Universal Human Right?" (1999) 21 H.R.Q. 156.

he is the author”². An important factor influencing the recognition of the author’s right as a human right was Article 13 of the American Declaration on the Rights and Duties of Man of 1948, and the drafters’ desire to achieve harmonisation³. Article 13 provides that “Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author”⁴.

The recognition of copyright as a human right in the Universal Declaration appears to be supported by the subsequent adoption of the International Covenant on Economic, Social and Cultural Rights 1966. Article 15(1)(c) of the Covenant recognises the right of the author “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”⁵.

Copyright, in its capacity as a human right, is characterised by a number of features, which are, arguably, absent when it is viewed as an intellectual property right. These features derive, to an extent, from the very nature of the human rights body and are reflected in the provisions of Article 27 of the Universal Declaration.

² This provision, which in effect recognises the need to protect the author of a work, can be said to be counter-balanced by the provisions of Article 27(1), which ensures the use and diffusion of information, and artistic and scientific creations. Article 27(1) reads as follows: “Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. For a discussion of the background to the drafting of Article 27 and its inclusion in the Declaration, see Morsink, J., *The Universal Declaration of Human Rights – Origins, Drafting & Intent* (University of Pennsylvania Press, 1999), at pp. 217-22.

³ For a more detailed discussion, see Chapman, A.R., “Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)” (2001) vol.XXXV, No. 3 Copyright Bulletin 4.

For a discussion of the historical background to the adoption of Article 27 of the Universal Declaration of Human Rights, see Torremans, P.L.C., “Copyright As A Human Right”, in *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (Torremans, P.L.C. (ed.), Kluwer Law International, 2004), 1, at pp. 4-7.

⁴ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by The Ninth International Conference of American States, Bogota, Columbia, 1948.

⁵ For an extensive discussion of this provision, its origins, drafting and substance, see Chapman, A.R., “Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)” (2001) vol. XXXV, No.3 Copyright Bulletin 4.

Firstly, as a human right, copyright recognises the equal importance of the economic and moral rights of the author, who is viewed as the scientist, creator and artist. In other words, copyright is also regarded as a personality right⁶, as opposed to a strong, principally economic right⁷ under the intellectual property regime⁸.

Secondly, human rights provisions highlight the need to balance the right of the author against the interests of the broader human community. This concept is echoed in copyright law to the extent that there is an overall desire to strike a balance between an individual's intellectual property rights and the common good of humanity as a whole, such desire not, it is submitted, being granted the prominence it enjoys within the human rights regime⁹.

Thirdly, copyright as a human right is a universal right¹⁰. It is vested in each and every individual, as non-discrimination is inherent in the concept of human rights. This is not, however, reflected in any of the international instruments of copyright codification, including the Berne Convention¹¹.

⁶ This view is similar to the author's right system in civil law countries. This approach is discussed in para. 1.2.2.

⁷ This approach is more prominent in common law systems of copyright. These systems are briefly discussed in para. 1.2.1.

⁸ "A human rights orientation acknowledges that intellectual products have an intrinsic value as an expression of human dignity and creativity. Put another way, artistic and scientific works are not first and foremost economic commodities whose value is determined by their utility and economic price tag.", Chapman, A.R., "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)" (2001) vol. XXXV, No.3 Copyright Bulletin 4, at p. 14.

⁹ "A human rights approach also takes the implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. A human rights orientation is predicated on the centrality of protecting and nurturing human dignity and the common good.", Chapman, A.R., "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)" (2001) vol. XXXV, No.3 Copyright Bulletin 4, at p. 14.

¹⁰ For a discussion of the concept of 'universalism' within human rights, see Steiner, H.J. and Alston, P., *International Human Rights in Context – Law, Politics, Morals* (2nd ed., Oxford University Press, 2000) at pp. 366 – 402.

¹¹ Protection under the Berne Convention largely depends on criteria of nationality of authors, place of publication of works, etc. For an extensive discussion of these provisions, see paras. 6.4.2.1 and 6.4.3.1.

2.3 INTERNATIONAL INSTRUMENTS

2.3.1 INTRODUCTION

The following paragraphs examine those human rights instruments that safeguard an individual's right of freedom of expression on an international level. These instruments include the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

They also provide a brief discussion of the historical background to the adoption of these instruments and the nature of the rights they recognise. The instruments' respective provisions relating to the protection of freedom of expression are also analysed.

2.3.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

2.3.2.1 HISTORICAL BACKGROUND

The Charter of the United Nations was the first international organ that gave formal and authoritative expression to the human rights movement¹² which began at the end of the Second World War¹³. It was signed in San Francisco on 26 June 1945 and entered into force in October of the same year.

In the autumn of 1945, the Preparatory Commission recommended that the United Nations Economic and Social Council (ECOSOC) should establish a Commission of Human Rights¹⁴ to produce and submit reports and proposals on an International Bill of Rights. The Commission was set up in 1946 and first met early in 1947. Some representatives recommended that the draft bill of rights under preparation should take the form of a Declaration¹⁵, while others urged the Commission to prepare a draft Convention containing legal obligations.

¹² It has to be noted however that within the Charter itself, there has been no elaboration as to the meaning of the concept of human rights nor does the Charter contain a catalogue of human rights.

¹³ The Charter, in its Preamble, promotes human rights "We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have resolved to combine our efforts to accomplish these aims".

¹⁴ "The Economic and Social Council shall set up Commissions in economic and social fields and for the promotion of human rights...", Charter of United Nations 1945, Article 68.

¹⁵ That is "a recommendation by the General Assembly to Member States that would exert a moral and political influence on states rather than constitute a legally binding instrument", Steiner, H.J., and Alston, P., *International Human Rights in Context* (2nd ed., Oxford

The first recommendation was followed and the Universal Declaration of Human Rights was adopted on 10 December 1948¹⁶ by the General Assembly with forty-eight states voting in favour, none against and eight abstaining¹⁷.

2.3.2.2 RECOGNISED RIGHTS

The Declaration is not legally binding as such; rather, the intention of those who drafted the Declaration was for it to establish general legal principles and goals for States to aim to achieve¹⁸. In effect, the aspiration was for it to be “first and foremost a declaration of the basic principles to serve as a common standard for all nations. It might become “the Magna Carta of all mankind”¹⁹.

Since 1948, the influence of the Universal Declaration has been profound. It has been recognised as a statement of principles which all States should observe²⁰. It reflects the human rights as prescribed within the United Nations Charter²¹. Even outside the United Nations circle, it has inspired the creation and adoption of

University Press, 2000) at p. 138. Also, see Gearon, L., *Freedom of Expression and Human Rights: Historical, Literary and Political Contexts* (Sussex Academic Press, 2006), Chapter 9.

¹⁶ For the purpose of drafting the Declaration, a committee was appointed which consisted of representatives of the state members of the Commission, namely, Australia, Chile, China, France, Lebanon, the United Kingdom, United States and USSR. The committee was chaired by Eleanor Roosevelt.

¹⁷ For a detailed discussion of the historical background to the adoption and drafting process of the Universal Declaration, see Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (University of Pennsylvania Press, 1999), Chapter 1.

¹⁸ The Declaration, in its preamble, states that “The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.

¹⁹ Words of Mrs. Roosevelt in the General Assembly. Quoted by Sohn, L.B., “A short history of United Nations documents on human rights” in *The United Nations and Human Rights*, 18th Report of the Commission to Study the Organisation of Peace, New York, 1968 at p.70.

²⁰ See, for example, the Declaration on Colonialism adopted in 1960 by the General Assembly (Resolution 1514 (XV)) which states that “All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration”.

²¹ “Each right contained in the Universal Declaration is effectively incorporated into the Charter”, Rodley, N.S., *The Treatment of Prisoners in International Law* (2nd ed., Clarendon Press, 1999) at p. 63.

numerous human rights treaties in Europe, the United States and Africa; these instruments frequently quote its provisions on the impact of the Declaration. Steiner states "The Declaration has retained its place of honour in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole"²².

The rights safeguarded under the Declaration are not binding as such; "when approved or adopted, [the Declaration] is hortatory and aspirational, recommendatory, rather than, in a formal sense, binding"²³.

The Declaration covers a broad range of human rights topics –including economic and social rights (Articles 22-26) as well as civil and political rights (Articles 1-21). No other treaty achieved this coverage again until the adoption of the International Covenants in 1966²⁴.

All human rights under the Universal Declaration are vested in individuals, in each and every individual²⁵ thus reflecting the universal nature of the rights; "Human rights are those rights held simply because one is a human being, goods, services, and opportunities to which everyone is entitled. Because one either is or is not a human being, human rights are held equally by all. Because one cannot stop being human, no matter how inhuman one's behaviour or the treatment one is forced to endure, they are inalienable rights"²⁶. Even though the Declaration does not state the duration of the rights explicitly, it can be assumed that, being individual rights, they shall last at least for the life of the individual.

²² See, Steiner, H.J., "Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond", Harvard Magazine, September –October 1998, at p.45.

²³ Steiner, H.J., and Alston, P., *International Human Rights in Context* (2nd ed., Clarendon Press, Oxford, 2000) at p. 142.

²⁴ The International Covenant on Civil and Political Rights is examined in para. 2.2.3. The International Covenant on Economic, Social and Cultural Rights does not recognise freedom of expression and therefore is not referred to in detail in the thesis.

²⁵ This is evident from the opening wording of the Articles of the Declaration; "Everyone has the right...", "Everyone is entitled to...", "No one shall...".

²⁶ Donnelly, J., "The Universal Declaration Model of Human Rights: A Liberal Defence" in Lyons, G.M. and Mayall, J. (eds.), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Lanham: Rowman and Littlefield, 2003), at para.1A.

2.3.2.3 FREEDOM OF EXPRESSION

Article 19 of the Universal Declaration of Human Rights 1948 recognises the individual's right of freedom of expression and reads as follows:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The provision that information and ideas can be received and imparted "regardless of frontiers" is evidence of the drafters' intention to secure full exchange both within nations and internationally. In other words, individuals are entitled to impart and receive information and ideas to and from individuals or groups in other States²⁷. In addition, the fact that information and ideas can be exchanged "through any media" implies the use of both communication by conventional methods as well as use of modern technology.

2.3.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

2.3.3.1 HISTORICAL BACKGROUND

At the time the Universal Declaration was adopted, the Commission had also prepared and submitted a draft of the Covenant which was however referred back by the General Assembly. The Commission had initially prepared a text on civil and political rights which, having followed the guidance of the General Assembly in 1950²⁸, it later changed to include in addition economic, social and cultural rights as well. The new text was further changed in 1952 when the General Assembly, considering the Security Council's recommendations, finally decided, following a long debate, that due to the differences between the two sets of rights acknowledged in the text, two separate Covenants should be adopted recognising each category of rights. Thus, the International Covenant on Civil Rights and the

²⁷ The same provision can be found in the Covenant on Civil and Political Rights 1966 and the American Convention on Human Rights 1961. For a more detailed discussion of this issue, see Smith, R.K.M., *Textbook on International Human Rights* (Oxford University Press, 2003) at p. 285.

²⁸ Resolution 421(V) of 4 December 1950. The Covenant did not come into force until 23 March 1976.

International Covenant on Economic, Social and Cultural Rights were adopted, albeit not until 1966.

The drafting process was long, lasting eighteen years. When the draft Covenants were reviewed by the General Assembly's Third Committee, even though there was a general consensus that the primary obligation under the Covenant would be implementation at the national level by States, there was continuing disagreement on the basic issue of international measures of implementation. The views of the Commission's members were sharply divided. On the one hand, some argued that such measures were contrary to the principle of domestic jurisdiction²⁹ and as such would undermine State sovereignty, while others held the view that they were a form of exercise of domestic jurisdiction and indeed a very beneficial one as observance of human rights constituted an international concern. Even within those States that favoured international measures there was widespread diversity regarding the types of measures that should be put into place; they ranged from the establishment of an International Court of Human Rights to that of reporting procedures covering some or all of the Covenant provisions.

When the Covenant was finally unanimously approved by the General Assembly on 16 December 1966, a "double system of implementation"³⁰ was effectively adopted: the functions relating to interstate communications were made optional³¹ while a new Human Rights Committee³² was established with competence to receive violation reports³³. In effect, "the result was a compromise between those States which favoured strong international measures and those which emphasized the primacy of national sovereignty and responsibility"³⁴.

²⁹ "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter", Article 2(7), Charter of the United Nations 1945.

³⁰ See, Robertson, A.H., and Merrills, J.G., *Human Rights in the World* (4th ed., Manchester University Press, 1996) at p.33.

³¹ International Covenant on Civil and Political Rights 1966, Article 1.

³² International Covenant on Civil and Political Rights 1966, Part IV, Articles 28-45.

³³ Arrangements providing for the consideration of individual complaints of violations were not included in the Covenant but put in the (First) Optional Protocol to the International Covenant on Civil and Political Rights instead approved in 1966 by majority vote.

³⁴ Opsahl, T., "The Human Rights Committee" in *The United Nations and Human Rights* (Alston P. (ed.), 1992) at p.371.

2.3.3.2 RECOGNISED RIGHTS

The Covenant on Civil and Political Rights, like the African Charter on Human and Peoples' Rights³⁵, stipulates that realisation of the rights and freedoms enshrined in it, is immediate³⁶.

The status of the Covenant is binding and, as such, it binds the State parties in accordance with its terms.

The Covenant contains 27 Articles which define, in greater detail than the Universal Declaration, a variety of rights and freedoms.

In essence, the Covenant sets out what some commentators regard as "first generation" human rights, that is "the fundamental basic human rights required to be exercisable by everyone in a fair democratic society"³⁷.

2.3.3.3 FREEDOM OF EXPRESSION

The right of freedom of expression is recognised in Article 19 of the Covenant, which reads as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be

³⁵ The Charter is discussed in para. 2.3.3.

³⁶ Article 2 of the Covenant on Civil and Political Rights 1966 provides: "1. Each party to the Present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, ... 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant ...".

³⁷ Smith, R.K.M., *Textbook on International Human Rights* (Oxford University Press, 2003) at p.46. Note that the Covenant, as is the case with the Covenant on Economic, Social and Cultural Rights, does not provide for a right to property.

subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights or reputations of others;
- (b) for the protection of national security or of public order (ordre public), or of public health or morals.

The Article, interestingly, makes a distinction in the treatment of the right to hold opinions and the right to freedom of expression. On the one hand, the right to hold opinions³⁸ seems to be absolute as no interference from any source is permissible. On the other hand, the provisions relating to freedom of expression³⁹ are subject to restrictions set out in paragraph 3 of the Article. In a general comment concerning Article 19, the Human Rights Committee emphasised the three requirements imposed by paragraph 3 with which any restriction must comply; “When a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the purposes set out in sub-paragraphs (a) and (b) of paragraph 3; and they must be justified as “necessary” for that State party for one of those purposes”⁴⁰.

2.4 REGIONAL INSTRUMENTS

2.4.1 INTRODUCTION

On a regional level, the Chapter focuses on the human rights instruments of the European, American and African regions. All instruments recognise and protect the author’s right of freedom of expression, and include:

- The European Convention on Human Rights,
- The American Convention on Human Rights, and
- The African Charter on Human and Peoples’ Rights

³⁸ Article 19, para.1.

³⁹ Article 19, para.2.

⁴⁰ *Report of the Human Rights Committee to the General Assembly*, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annexe VI, General Comment 10.

There follows a brief description of the historical background to the adoption of the instruments, the rights they recognise and the scope of freedom of expression for each region.

2.4.2 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS FUNDAMENTAL FREEDOMS 1950

2.4.2.1 HISTORICAL BACKGROUND

Three factors led to the adoption of the European Convention. Firstly, it was a natural response to the atrocities of the Nazi and Fascist systems that led to the Second World War whereby the denial of human rights was a deliberate instrument of policy. An effective system of protection of human rights was seen as the best means to “erect a bulwark against any recrudescence of dictatorship”⁴¹.

Secondly, both the Council of Europe and the European Union held the view that regional integration and institutionalisation of common values constituted the best way of ensuring that Germany would be a force in peace. This view is reflected in the Preamble of the Convention which talks of “governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law”.

Thirdly, the creation of the Convention was triggered by the belief, in the post-war years, that countries of Western Europe needed protection against the Communist style of despotism. The document protecting fundamental freedoms would, as Robert Schuman put it, set “the foundations on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism”.

The task of writing up the Convention was assumed by the Consultative Assembly of the Council of Europe in 1949. The Convention was signed in Rome in November 1950 and entered into force on 3 September 1953⁴². Having overcome concerns over sovereignty and State accountability, the Convention’s Preamble

⁴¹ Robertson, A.H. and Merrills, J.G., *Human Rights in the World* (4th ed., Manchester University Press, 1996) at p. 120.

⁴² For a list of the countries that are members of the Convention, see Appendix 3.

acknowledges that it constitutes merely “the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration”.

In the summer of 1950, even before the Convention was signed, the Assembly proposed the inclusion of three further rights⁴³ which were subsequently written up in Protocol No.1 signed in March 1952⁴⁴.

2.4.2.2 RECOGNISED RIGHTS

The importance of the European Convention system has been described as “the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; and it has generated a more extensive jurisprudence than any other part of the international system”⁴⁵.

The Convention and its Protocols⁴⁶ define twenty five rights and freedoms all of which are civil and political rights.

Some of the rights are set out in detail. Articles first provide a general affirmation of the relevant right or freedom, similar to the wording of the Universal Declaration on Human Rights. They then lay down the limitations to which the right or freedom may be subject to. The right of freedom of expression (Article 10) is an example of such a structure.

Member states have to guarantee the rights and freedoms of the Convention to all persons within their jurisdiction, regardless of their national or legal status. This

⁴³ The three new rights included the right to property (Article 1), the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions (Article 2) and the right to free elections (Article 3).

⁴⁴ Ten further Protocols have been concluded to the present, with Protocol No.11 having been signed in 1994.

⁴⁵ Steiner, H., J., and Alston, P., *International Human Rights In Context* (2nd ed., Oxford University Press, 2000) at p.786.

⁴⁶ Eleven Protocols have been concluded since the Convention entered into force in 1953 and 1994. Protocols 10 (concerning voting arrangements) and 11 (concerning the control system) are not yet in force. For a detailed analysis of the historical background to and content of the Protocols, see Robertson, A.H., and Merrills, J.G., *Human Rights in the World* (4th ed., Manchester University Press, 1996), chapter 4.

obligation is assumed by each state under Article 1 of the Convention which reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention”.

2.4.2.3 FREEDOM OF EXPRESSION

The right to freedom of expression has been acknowledged to be an “essential foundation of a democratic society” and a “basic condition for its progress and for the development of every man”⁴⁷. The right is protected under Article 10 of the Convention, which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The right can be relied upon by “everyone”, including legal and natural persons⁴⁸. Thus, Article 10 has been held to apply to publishers⁴⁹, authors⁵⁰, profit-making corporate bodies, such as newspapers⁵¹, journalists, and civil servants, including teachers⁵², judges⁵³, local government officers⁵⁴ and members of the armed forces⁵⁵.

⁴⁷ *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737 (ECtHR) at para.49 and *Zana v. Turkey* (18954/91) (1997) 27 E.H.R.R. 667 (ECtHR) at para. 51.

⁴⁸ *Autotronic A.G. v. Switzerland* (1990) 12 E.H.R.R. 485 (ECtHR).

⁴⁹ *Unabhängige Initiative Informations Vielfalt v. Austria* (2003) 37 E.H.R.R. 33 (ECtHR).

⁵⁰ *Groppera Radio A.G. v. Switzerland* (1990) 12 E.H.R.R. 321 (ECtHR).

⁵¹ *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 (ECtHR).

⁵² *Morissens v. Belgium* (11389/85) (1988) 56 D.R. 127 (ECommHR).

The scope of the right appears to be wide as “expression” has been interpreted broadly to include communications of any kind or subject matter: spoken or written words, television programs and broadcasting⁵⁶, films⁵⁷, paintings⁵⁸, videos⁵⁹, photographs⁶⁰, dress⁶¹, graffiti⁶², banners or posters⁶³, press conferences and interviews⁶⁴, musical performances by street musicians⁶⁵.

Almost all forms of expression fall within the scope of Article 10. Thus, political expression⁶⁶, commercial expression⁶⁷, artistic expression⁶⁸ and scientific literature

⁵³ *H v. Austria*, App. No. 20831/92; Decision of 2.3.94 (unpublished).

⁵⁴ *Ahmed v. United Kingdom* (1998) 29 E.H.R.R. 1 (ECtHR).

⁵⁵ *Engel v. Netherlands* (1976) 1 E.H.R.R. 647 (ECtHR).

⁵⁶ *Hodgson, Woolf Productions, and National Union of Journalists and Channel 4 Television v. United Kingdom* (11553/85 and 11685/85) (1987) 51 DR 136; (1987) 10 E.H.R.R. 503, ECommHR.

⁵⁷ *Otto-Preminger-Institut v. Austria* (1994) 19 E.H.R.R. 34 (ECtHR).

⁵⁸ *Muller v. Switzerland* (1988) 13 E.H.R.R. 212 (ECtHR).

⁵⁹ *Wingrove v. United Kingdom* (1996) 24 E.H.R.R. 1 (ECtHR).

⁶⁰ *Douglas v. Hello!* (2001) 2 All E.R. 289.

⁶¹ *Stevens v. United Kingdom* (11674/85) (1986) 46 D.R. 245 (ECommHR).

⁶² *N v. Switzerland* (1982) 34 D.R. 208 (ECtHR).

⁶³ *X v. Germany* (9235/81) (1982) 29 D.R. 194 (ECommHR) (defendant convicted for putting a poster denying the Holocaust in his garden).

⁶⁴ *K (A Child) v. BBC* (2001) All E.R. 323.

⁶⁵ *H and K v. United Kingdom* (1983) 34 D.R. 218.

⁶⁶ In *Thorgeir Thorgeirson Islande v. Iceland* (1992) 14 E.H.R.R. 843 (ECtHR), it was held that political expression has to be interpreted broadly so as to include both political matters in the strict sense as well as other matters of public interest. See also, *Barfod v. Denmark* (1989) 13 E.H.R.R. 493 (ECtHR) (protection accorded to publication concerning the impartiality of a court), *Tidende v. Norway* (2001) 31 E.H.R.R. 430 (ECtHR) (protection accorded to publication concerning public health).

⁶⁷ It is the aim of the expression that determines whether it is “commercial”. Thus, if it is directed at promoting commercial or financial interests it can be considered “commercial” – *Demuth v. Switzerland*, App. No. 38743/97, Judgment of November 5, 2002 (paras. 41 and 42). However, the fact that a publication has a commercial value does not in itself render it “commercial” – *Barthold v. Germany* (1985) 7 E.H.R.R. 383 (ECtHR).

⁶⁸ In *Muller v. Austria* (1988) 13 E.H.R.R. 212 (ECtHR), the Court held freedom of expression to include “... freedom of artistic expression – notably within freedom to receive and impart information and ideas- which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds” (para. 27). Further, the Court emphasised that “those who create, perform, distribute or exhibit works of art, contribute to the exchange of ideas and opinions which is essential for a democratic society” and as such, the state should not encroach unduly upon their freedom of expression (para. 33). See e.g. *X Ltd. and Y v. United Kingdom* (8710/79)(1982) 28 D.R. 77 (ECommHR) (concerning allegedly blasphemous poems), *Familiapress-Zeitungs-GmbH v. Austria* (1992) 80 D.R. 74 (ECtHR) (a strike-out report after admissibility where the case concerned the exchange of satirical poems between newspapers).

and information⁶⁹ are all protected under this human right. "Expression" is also applicable to ideas or opinions that "offend, shock, or disturb" the State or any sector of the population⁷⁰. Thus, in *Jersild v. Denmark*, the Court held that sentencing a journalist who edited a television program to include crude racist comments by a "group of extremist youths" was disproportionate to the need to protect those whom he had insulted - "It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"⁷¹.

However, the European Court of Human Rights has held that expression negating "clearly established historical facts", such as the Holocaust, "would be removed from the protection of Article 10"⁷². Further, the Court has occasionally suggested that "valueless" expression may not be protected under Article 10⁷³.

The Article distinguishes between ideas and information, thus making it clear that "expression" is not restricted to statements of fact. It has been held to include criticisms, speculations and value judgments, regardless of whether or not they are objectively "true"⁷⁴. Nevertheless, an opinion must amount to fair comment or have some foundation in the circumstances⁷⁵.

⁶⁹ See e.g. *T v. United Kingdom* (1978) 49 D.R. 5 (ECtHR) (prohibition on sending scientific literature out of prison), *M v. France* (1982) 41 D.R. 103 (ECtHR) (conviction of a computer scientist for passing scientific information to foreign agents).

⁷⁰ *R v. Central Independent Television plc* [1994] 3 All E.R. 641, C.A..

⁷¹ *Jersild v. Denmark* (1994) 19 E.H.R.R. 1 (ECtHR) at para.31.

⁷² *Lehideux and Isornia v. France* (24662/94) RJD 1998-VII 2864;(1998) 5 B.H.R.C. 540 (ECtHR). See also, for a similar approach, *Walendy v. Germany*, App. No. 21128/92; 80 D.R. 94 (denying the policy of extermination of Jews by the Nazi regime), *Marais v. France*, App. No. 31159/96; 86-A D.R. 184 (ECtHR) (denying the existence of gas chambers in concentration camps).

⁷³ In *Otto Preminger-Institut v. Austria* (1994) 19 E.H.R.R. 34 (ECtHR), the applicants complained about the seizure and forfeiture of a satirical film with a religious subject-matter under domestic blasphemy laws. The Court, stressing that any "formality", "restriction", "condition", or "penalty" imposed must be proportionate to the legitimate aim pursued, held that on the facts, the film offered insufficient contribution to public debate or artistic merit to outweigh the features that made it offensive.

⁷⁴ *Lingens v. Austria* (Series A No. 103) (1986) 8 E.H.R.R. 4 103 (ECtHR). In *Thorgeir Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843 (ECtHR), the Court held that requiring a journalist to prove the truth of "rumours" or "stories" relating to police brutality that he reported, was an impossible task and as such, his conviction for criminal defamation violated Article 10.

⁷⁵ A value judgment without any factual basis to support it may be considered excessive – *De Haes v. Belgium* (1997) 25 E.H.R.R. 1 (ECtHR) at para.47. In *Feldek v. Slovakia*, App.

Furthermore, the fact that views are expressed in polemical or aggressive⁷⁶, exaggerated or provocative⁷⁷, or even insulting⁷⁸ manner does not automatically take them outside the scope of Article 10⁷⁹. Thus, in *De Haes and Gijssels v. Belgium*⁸⁰, journalists who criticised certain members of the judiciary for their handling of child abuse and incest proceedings when writing critical articles were entitled to rely on Article 10 – “Although the applicants comments are severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged”⁸¹.

Article 10 prohibits the State from restricting the receipt by an individual of information or ideas that others wish to impart to him, this right having been described as the “lifeblood” of democracy⁸². In cases concerning freedom of the press, the European Court of Human Rights has recognised that the right of the public to receive information and ideas on matters of public interest is a corollary of the function of journalists to impart such information and ideas⁸³.

The Convention was the first human rights instrument to provide expressly for express limitations on the right of freedom of expression. Given the wide scope of Article 10(1) most cases involve consideration of whether a restriction on or interference with expression can be justified under Article 10(2).

The first point is that, under Article 10(2), any interference with freedom of expression must be prescribed by law. The Court has ruled that the phrase

No.29032/95, 2001 at paras. 75 and 86 (ECtHR), it was stated that “the necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances”.

⁷⁶ *De Haes Gijssels v. Belgium* (1997) 25 E.H.R.R. 1 (ECtHR).

⁷⁷ *Prager and Oberschlick v. Austria* (1995) 21 E.H.R.R. 1 (ECtHR).

⁷⁸ *Oberschlick v. Austria (No.2)* (1997) 25 E.H.R.R. 357 (ECtHR).

⁷⁹ The fact that a journalist could have made his point without the use of insults but chose not to, could constitute a strong argument against the journalist’s reliance upon Article 10 – *Tammer v. Estonia*, Judgment of February 6, 2001; App. No. 41205/98, ECtHR 2001 (para. 67).

⁸⁰ (1997) 25 E.H.R.R. 1 (ECtHR).

⁸¹ (1997) 25 E.H.R.R. 1 (ECtHR) at para. 48.

⁸² *R. v. Home Secretary, Ex p. Simms* [2000] A.C. 115, at 126 per Lord Steyn. Also see, *Leander v. Sweden* (1987) 9 E.H.R.R. 433 (ECtHR) at para. 74.

⁸³ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) 1 E.H.R.R. 711 (ECtHR) at para. 52.

“prescribed by law” creates three requirements, namely that, the interference in question must have some basis in domestic law, the law must be adequately accessible and that it must be formulated so that it is sufficiently foreseeable⁸⁴.

Further, the “necessity” test of Article 10(2) has been expressed as the requirement that the means employed must be proportionate to the aim pursued or that the restriction should correctly balance the conflicting individual and public interests at stake⁸⁵. In assessing whether or not an interference is “necessary in a democratic society”, the European Court of Human Rights applies a three-step test, namely it examines whether the interference complained of corresponds to a “pressing social need”, whether it is “proportionate to the legitimate aim pursued”, and whether the reasons given by the national authority to justify are “relevant and sufficient”⁸⁶.

Article 10(2) contains the further element that the authors of the expression have certain “duties and responsibilities”⁸⁷. Judicial jurisprudence has set out certain factors that have to be taken into account in determining whether, and to what extent, any duties and responsibilities must be weighed against any restriction or penalty imposed. The restricted expression must in some way be linked to those

⁸⁴ *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 (ECtHR); *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347 (ECtHR); *Malone v. United Kingdom* (1984) 7 E.H.R.R. 14 (ECtHR).

⁸⁵ *Venables v. News Group Newspapers* [2001] 1 All E.R. 908: “It would seem to me however that whether it is called a balancing process or any other description, the conflict that may arise between Art.10(1) and Art.10(2) has to be resolved and the legitimate aim in restricting freedom of expression within the exceptions in Art.10(2) given proportionate weight according to the facts of the individual case” (paras. 32-33, 42-43).

⁸⁶ *Sunday Times v. United Kingdom (No.1)* (1979) 2 E.H.R.R. 245 (ECtHR) at para. 62.

⁸⁷ “Whoever exercises his freedom of expression undertakes ‘duties and responsibilities’ the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person’s ‘duties and responsibilities’ when it enquires ... whether ‘restrictions’ or ‘penalties’ were conducive to the [legitimate aim] which made them ‘necessary’ in a ‘democratic society’”, *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737 (ECtHR) at para. 49.

duties and responsibilities⁸⁸, the connection must be substantiated “by specific examples”⁸⁹ and the impact of the medium used on the public must be considered⁹⁰.

Overall, the fundamental principles of the scope of the right of freedom of expression, as provided for under Article 10 of the Convention, can be summarised using the statement of the European Court of Human Rights in the case of *Zana v. Turkey*⁹¹:

“(1) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self fulfilment. Subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly⁹².

(2) The adjective ‘necessary’ within the meaning of Article 10 implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions relating to it, even those given by an independent court. The Court is therefore empowered to give the final

⁸⁸ “Permissible conditions affecting freedom of expression only arise where they are necessary in a democratic society in the light of the actual duties and responsibilities which are implied by the exercise of freedom of expression and opinion by a given individual. The necessity for conditions or restrictions must therefore flow from the applicant’s circumstances”, *Kosiek v. Germany* (Series A No.105) (1986) 9 E.H.R.R. 328 (ECtHR) at para. 88.

⁸⁹ *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria* (Series A No. 302) (1994) 20 E.H.R.R. 55 (ECtHR).

⁹⁰ “... the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audio-visual media have often had a much more immediate and powerful effect than the print media. The audio-visual media have means of conveying through images meanings which the print media are not able to impart”, *Jersild v. Denmark* (1994) 19 E.H.R.R. 1 (ECtHR) at para. 39.

⁹¹ (1997) 27 E.H.R.R. 667 (ECtHR) at para.51.

⁹² *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737 (ECtHR) at para.49; *Lingens v. Austria* (Series A No. 103) (1986) 8 E.H.R.R. 103 (ECtHR) at para.31.

ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10⁹³.

(3) In exercising its supervisory jurisdiction, the Court must look at the whole, including the content of the remarks held against the applicant and context in which he made them. In particular, it must determine whether the interference in issue is 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities are 'relevant and sufficient'⁹⁴. In so doing the Court has to satisfy itself that the national authorities applied standards which are in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts⁹⁵."

2.4.3 AMERICAN CONVENTION ON HUMAN RIGHTS 1969

2.4.3.1 HISTORICAL BACKGROUND

At the ninth Inter-American Conference, held in Bogotá in May 1948, the American States adopted the "Charter of Bogotá"⁹⁶ and thereby established the Organisation of American States (OAS). The Conference also adopted the American Declaration of the Rights and Duties of Man.

The Inter-American Commission on Human Rights was created by a resolution of the foreign ministers at Santiago in 1959. The purpose of the Convention can be found in its Preamble to be the States intention "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man".

The process of drafting and negotiation of the Inter-American Treaty began in 1959 with a draft Convention prepared by the Inter-American Council of Jurists and the

⁹³ *Lingens v. Austria* (Series A No. 103) (1986) 8 E.H.R.R. 103 (ECtHR) at para. 39.

⁹⁴ *Barfod v. Denmark* (1989) 13 E.H.R.R. 493 at para. 28.

⁹⁵ *Jersild v. Denmark* (1994) 19 E.H.R.R. 1, at para. 31.

⁹⁶ The Charter entered into force in December 1951 and has since been amended by the Protocol of Buenos Aires of 1967, the Protocol of Cartagena de Indias of 1985, the Protocol of Washington of 1992, and the Protocol of Managua of 1993.

final text of the American Convention on Human Rights⁹⁷ was adopted at a Special Conference on Human Rights held in San José, Costa Rica in November 1969.

Following closely the model of the European Convention, the American Convention⁹⁸ provides for interpretation, application and enforcement by the Inter-American Commission⁹⁹ and a new Inter-American Court on Human Rights.

2.4.3.2 RECOGNISED RIGHTS

In general, the application of the American Convention, despite its long history, is not as developed as the European system. Nevertheless, the achievements have been remarkable considering that, for many years, a number of Latin American States were in the grip of military rule and the turmoil of revolution. According to a former member of the Inter-American Commission, "in many ways the Inter-American system has not been as efficient as the European regional system, though its mandate is notably broader. The challenges the Inter-American system has faced are, however, severe and make its accomplishments all the more impressive. The fact that government leaders, diplomats, commission and court members, and many non-governmental organizations in the Americas have been able, often in an ongoing adversarial collaboration, to fashion and implement a useful human rights instrument may be of particular importance to those interested in establishing regional human rights systems"¹⁰⁰.

The Convention restricts itself to a detailed codification of civil and political rights (Articles 3-25).

⁹⁷ The Convention is also known as the "Pact of San José". It was signed on 22 November 1969 and entered into force on 18 July 1978.

⁹⁸ For a list of the countries that are members of the Convention, see Appendix 3.

⁹⁹ In 1967, in the amended Charter, the Commission became a statutory organ of the Organisation of American States "whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative document organ of the Organisation in these matters", Third Special Inter-American Conference, Buenos Aires, February 1967.

¹⁰⁰ Reisman, M., W., "Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience" (1995) St. Louis-Warsaw Transnat'l 89.

Economic, social and cultural rights are all covered in a single Article (Article 26) which cross-refers to the Charter of the Organization of American States (as amended by the Protocol of Buenos Aires)¹⁰¹.

2.4.3.3 FREEDOM OF EXPRESSION

Article 13 of the Convention recognises the right to freedom of thought and expression and reads as follows:

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any

¹⁰¹ On this issue, the Organisation of American States, in 1988 adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). The Protocol mainly reflects the rights of the International Covenant on Economic, Social and Cultural Rights 1966.

grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Under the Convention the right of freedom of expression has a “dual” character. On the one hand, it safeguards the right of the individual to express his own thoughts. On the other, it protects the collective right to seek and receive any information¹⁰². Nevertheless, the two dimensions of the right must be guaranteed simultaneously; the one dimension cannot be undermined for the interest of the other: “One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view”¹⁰³. In addition, the expression and dissemination of ideas and information are indivisible concepts¹⁰⁴.

In addition, Article 13 provides that “any medium” deemed appropriate to impart ideas and have them reach as wide an audience as possible can be used.

The Article explicitly recognises the authority of the State to place limitations upon the right to freedom of expression. At the same time however, both the Commission and the Court have made it clear that any discretion given to the State must be construed narrowly¹⁰⁵.

The Convention does provide for restrictions that can be placed on the exercise of the right. However, in determining their legitimacy, it is necessary to consider

¹⁰² Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30, Annex A.

¹⁰³ Inter-American Commission on Human Rights, 1995 Annual Report, Report No. 2/96 (Case No. 10.325 – Steve Clark), Grenada at paras. 8 and 9.

¹⁰⁴ Annual Report of the Inter-American Commission on Human Rights 1998, Organisation of the American States (O.A.S.), Chapter II: Freedom of Expression within the Context of the Inter-American System for the Protection of Human Rights, 13, OEA/ser. LV/II.102 doc. 6 rev.

¹⁰⁵ *Clark v. Grenada*, Case 10.325, Report No. 2/96, Inter-Am.C.H.R., OEA/Ser.LV/II.91 Doc. 7 at 113 (1996).

whether the provisions of Article 13(2) have been respected. Article 13(2) sets out the means by which permissible limitations upon freedom of expression may be established: there are requirements of form as well as substantive requirements referring to the legitimacy of the ends that such restrictions on freedom of expression are designed to achieve –i.e. the principle of proportionality.

Paragraphs 3 and 4 of the Article illustrate that the use of preventive measures to control any abuse of the right are not permissible¹⁰⁶. Abuse can only be controlled through subsequent imposition of sanctions in cases where such a restriction is “necessary”¹⁰⁷.

Paragraph 3 in particular, illustrates that the Convention is particularly concerned with freedom of the press. This is different from other instruments that merely imply a prohibition on indirect restrictions on media in that it is the only instrument that expressly prohibits “privacy controls” that produce the same result. The prohibition of prior censorship is absolute and unique to the Convention.

2.4.4 AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS 1981

2.4.4.1 HISTORICAL BACKGROUND

The Organisation of African Unity (OAU) is the official regional body of all African States. The Organisation of African Unity’s Charter was adopted in 1963, in the wake of rapid and widespread decolonisation, by a summit conference of Heads of State and Government held in Addis Ababa. It was primarily aimed at “[eradicating] all forms of colonialism from Africa” and “[promoting] the unity and solidarity of the African States” as well as the defence of “their sovereignty, their territorial integrity and independence”¹⁰⁸. As such, of central importance in the Charter are the principles of sovereign equality of all member States and non-interference in their internal affairs. The Charter also stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of

¹⁰⁶ Inter-American Commission on Human Rights, 1996 Annual Reprt, Report No. 11/96 (Case No. 11.230 – Francisco Martorell), Chile, para. 55.

¹⁰⁷ This requirement should be interpreted in the same way as the respective requirement under Article 10 of the European Convention on Human Rights 1950. That is, for the restriction to be “necessary”, the “existence of a pressing social need” has to be established. It is not enough for it to be “useful”, “reasonable” or “desirable”.

¹⁰⁸ Charter of the Organisation of African Unity 1993, Article II(1).

the African peoples”¹⁰⁹ acknowledging both the United Nations Charter and the Universal Declaration.

The process of the formation of an African Commission on Human Rights began in 1961¹¹⁰ and extended over the next twenty years culminating with the adoption of the African Charter on Human and Peoples’ Rights in 1981¹¹¹. The legal basis for this Charter can be found in the Organisation of African Unity’s Charter which states that member States should “coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa”¹¹² and “promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights”¹¹³.

The implementation of the Charter¹¹⁴ is entrusted to a Commission, the main executive African organ. It is composed of eleven members elected by the Assembly of Heads of State and the Government. The role of the Commission is three-fold. It has promotional functions¹¹⁵, and is responsible for ensuring the adequate protection¹¹⁶ and for interpreting the Charter rights.

2.4.4.2 RECOGNISED RIGHTS

The African Charter is the youngest developed regional system and has been described as “the newest, the least developed or effective ... the most distinctive and most controversial of the three [i.e. the European, the Inter-American and the

¹⁰⁹ African Charter on Human and Peoples’ Rights 1981, Article II(1)(e).

¹¹⁰ The creation of an African Commission on Human Rights was first proposed at the African Conference on the Rule of Law, organised by the International Commission of Jurists in Lagos in 1961 where it was declared that “in order to give full effect to the Universal Declaration of Human Rights, this Conference invites the African Governments to study the possibility of adopting an African Convention on Human Rights”.

¹¹¹ The Charter was approved at the eighteenth summit meeting of the Organisation of African Unity, held in Nairobi in June 1981 and came into force in October 1986. The Charter is also known as the Banjul Charter after Banjul, Gambia’s capital city, where the Charter was drafted.

¹¹² Organisation of African Unity’s Charter, Article II(1)(b).

¹¹³ Organisation of African Unity’s Charter, Article II(1)(e).

¹¹⁴ For a list of the countries that are members of the Charter, see Appendix 3.

¹¹⁵ Article 45(1) of the Charter sets out the promotional role of the Commission.

¹¹⁶ The Charter provides for a mandatory procedure for inter-State complaints (Article 48) as well as a procedure for individual complaints (Articles 55-59).

African] established human rights regime¹¹⁷". It must nevertheless be acknowledged that even the very existence of a coherent system of protection of human rights is a major achievement for the region given the prevalence of oppressive regimes and serious, systematic violations of human rights.

The Charter is unique among international and regional instruments in its emphasis on the importance of the community and society to the individual and its express cataloguing of the duties of the individual to the State. This rationale is reflected in its inclusion of peoples rights. According to Sieghart¹¹⁸, the primary reason for this emphasis has been the desire of the States to promote the concept that civil and political rights should be counter-balanced by duties of social solidarity. Interestingly however, the drafters of the Charter have avoided the complex issue of the definition of the term "peoples"¹¹⁹.

Another notable feature of this instrument is that States are not permitted to derogate from the Articles of the Charter¹²⁰.

The Charter combines all types of rights in one instrument. Its preamble states that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality" and goes further to emphasise that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

As such, the Charter starts by setting out a catalogue of civil and political rights (Articles 2-14), it continues with a list of economic, social and cultural rights (Articles 15-18) and goes on with certain provisions relating to rights of "peoples" (i.e. collective rights), as opposed to rights of individuals (Articles 19-24). The Charter

¹¹⁷ Steiner, H.J., and Alston, P., *International Human Rights in Context* (2nd ed., Oxford University Press, 2000).

¹¹⁸ Sieghart, P., *The International Law of Human Rights* (Clarendon Press, 1983), at p. 238.

¹¹⁹ For a detailed discussion on the lack of a uniform meaning to the term "peoples", see Sieghart, P., *The International Law of Human Rights* (1983, Clarendon Press, Oxford), at pp. 250-51.

¹²⁰ "The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them", African Charter on Human and Peoples' Rights 1981, Article 1.

then moves on to duties for States (Articles 25 and 26) and individuals (Articles 27-29).

2.4.4.3 FREEDOM OF EXPRESSION

The African Charter safeguards freedom of expression in Article 9 which provides that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.

The Article provides only for the right to receive information as opposed to respective provisions in other instruments which provide for the right to “receive and impart information and ideas”. It appears that in this way, the Charter creates the unusual right to “receive information”.

An important feature of this Charter Article, which has proven to be controversial, is its provision of the so-called “claw-back” clause –“within the law”- which authorises the State to deprive the individual of their rights¹²¹. It has been criticised on the ground that it confers upon the State a wide margin of discretion to exclude enjoyment of the right as it is allowed to justify limitations on the right by reference to its own domestic laws¹²². Although the grant of the right is supposed to be paramount, the claw-back clause may, in effect, take away the right granted.

2.5 NATIONAL LAWS

2.5.1 INTRODUCTION

This section examines the protection of the right of freedom of expression on a national level. It discusses relevant human rights instruments and, where appropriate, national constitutions that safeguard that right. This section also makes

¹²¹ Claw-back clauses are used in Articles 5-12 of the Charter and not only in the case of freedom of expression.

¹²² For a detailed discussion of the issue, see Welch, J., “The African Commission on Human and Peoples’ Rights: A Five Year Report and Assessment” (1992) 14 H.R.Q. 43 at p.46 and, Higgins, R., “Derogations Under Human Rights Treaties” (1976-77) 48 B.Y.I.L. 281.

reference to relevant national case law in order to ascertain the scope of the right and any limitations that are placed upon it by the respective legislatures.

On a national level, freedom of expression is examined in the context of the relevant laws of the following countries:

- The United Kingdom,
- The United States of America,
- France, and
- Germany

2.5.2 UNITED KINGDOM: HUMAN RIGHTS ACT 1998

Until the passing of the Human Rights Act in 1998 the rights of freedom of expression in English law, like other civil liberties, was largely residual. In other words, it existed where common law or legislation did not restrict its application¹²³. Its role was not considered to be prominent¹²⁴ as it was often treated as an exception or defence to other rights, such as defamation¹²⁵, breach of confidence and contempt of court.

However, in recent years, with the adoption of the European Convention on Human Rights¹²⁶ and its incorporation into UK law by the Human Rights Act, freedom of

¹²³ For a detailed discussion of the position of freedom of expression in UK law prior to the Human Rights Act, see Barendt, E., *Freedom of Speech* (2nd ed., Oxford University Press, 2005) at pp. 40-42; Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, 2000) at pp. 1006-45 and 1207-09.

¹²⁴ "Freedom of discussion is in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written", Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th ed., Macmillan, 1959), at Chapter VI; Boyle, A., "Freedom of Expression as a Public Interest in English Law" [1992] PL 574.

¹²⁵ *Bonnard v. Perryman* [1891] 2 Ch. 269.

¹²⁶ "Lord Goff of Chieveley in *A-G v. Guardian Newspapers Ltd (No.2)* [[1990] 1 A.C. 109, at 283-84] expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the treaty in this particular field", *Derbyshire County Council v. Times Newspapers Ltd* [1993] A.C. 534, at 553F, *per* Lord Keith.

expression has steadily assumed a more positive and active role¹²⁷. Under the Act, the United Kingdom must secure the rights set out in the Convention¹²⁸. Where legislation conflicts with Convention rights, the courts will have to comply with a strong interpretative obligation to read and give effect to the legislation, so far as is possible, in order for it to be compatible with the Convention rights¹²⁹.

The Act is designed to provide a minimum standard of human rights protection and to ensure that protection “does not restrict any other right or freedom conferred on [a person] or by [a person] or under the law having effect in any part of the United Kingdom”¹³⁰.

Section 12, the statutory provision recognising freedom of expression, was introduced as a result of concerns expressed by the media as to the impact of the privacy rights on the freedom of the press¹³¹. Its aim was to “enhance press freedom in a wider way than would arise simply from the incorporation of the Convention”¹³².

Section 12(1) establishes the scope of its application, namely the protection of freedom of expression as the right is enshrined under the European Convention on

¹²⁷ “There is a general principle in our law that the expression of opinion and the conveyance of information will not be restrained by the courts save on pressing grounds. Freedom of expression is as much a sinew of the common law as it is of the European Convention...”, *R v. Advertising Standards Authority Ltd, ex parte Vernons Organisations Ltd* [1992] 1 W.L.R. 1289, at 1293A.

¹²⁸ Under section 1(1), the Human Rights Act gives effect to Articles 2-12 and 14 of the Convention (and Articles 1-3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol to the Convention).

The Human Rights Act received Royal Assent on November 9, 1998 while its main provisions were brought into effect on October 2, 2000.

The general aims of the Act are set out in the White Paper, *Rights Brought Home: The Human Rights Bill*, CM 3782 (HMSO, October 1997).

¹²⁹ Human Rights Act 1998, s.3(1).

¹³⁰ Human Rights Act, section 11(a).

¹³¹ Jack Straw, MP set out the main aim of section 12: “So far as we are able in a manner consistent with the Convention and its jurisprudence, we are saying to the court that wherever there is a clash between article 8 and article 10 rights, they must pay particular attention to the article 10 rights”, HC Deb., July 2, 1998, Col. 538ff: The Home Secretary. For *Hansard* extracts on section 12, see Wadham, J. and Mountfield, H., *Blackstone’s Guide to the Human Rights Act 1998* (Blackstone, 1999) at 227-30.

¹³² See, the statement of the Home Secretary on its introduction: *Hansard*, HC col 535 (2 July 1998) and, Wadham, J., and Mountfield, H., *Blackstone’s Guide to the Human Rights Act 1998* (Blackstone, 1999) at pp.227-230.

Human Rights. It provides that "This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression".

Section 12 will apply to "any relief" which, if granted, "might affect" the exercise of the Convention right. This wording suggests that:

- The right extends beyond the protection of press freedom. Thus, injunctions granted in actions for copyright can affect the exercise of freedom of expression.
- Relief under the Act is not restricted to injunctive relief; it must include awards of damages in civil actions¹³³.

Section 12(2)¹³⁴ sets out the requirements that have to be satisfied for an injunction to be granted in cases where the respondent is absent.

Section 12(3)¹³⁵ establishes that for an injunction to be granted, the claimant must show that he is likely to succeed at trial¹³⁶.

Section 12(4) states that the court must have particular regard to the importance of the right to freedom of expression when granting relief. It also sets out factors that the court must take into account where the proceedings relate to journalistic, literary or artistic material¹³⁷. The section reads as follows:

¹³³ See, *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 E.H.R.R. 442. Also, see Human Rights Act 1998, section 12(5).

¹³⁴ Section 12(2) provides as follows:

If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied –

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

¹³⁵ Section 12(3) provides as follows: "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed".

¹³⁶ See, *NWL Ltd v. Nelson* [1979] ICR 867 (injunctions in industrial relations disputes). For the interpretation and application of the word 'likely' in the section 12(3) provision, see *Cream Holdings Ltd v. Banerjee* [2004] HL 44; [2005] AC 253.

¹³⁷ For an in-depth analysis of the provisions of section 12 and relevant case law, see Clayton, R. and Tomlinson, H., *The Law of Human Rights* (Oxford University Press, 2000) at pp. 1087-1112; Clayton, R. and Tomlinson, H., *Privacy and Freedom of Expression* (Oxford University Press, 2006) at Chapter 15.

“The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

(a) the extent to which –

- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code”.

It appears that, under the Act, freedom of expression is not accorded pre-eminence but must be balanced against competing Convention rights and interests¹³⁸. Case law seems to suggest that any restrictions imposed on freedom of expression must satisfy the principle of proportionality. In other words, any restriction must not go further than is necessary to safeguard the competing interest at issue¹³⁹.

2.5.3 UNITED STATES OF AMERICA

Freedom of speech was first recognised in Article 4 of the American Declaration of the Rights and Duties of Man of 1948¹⁴⁰.

The principal legal provision safeguarding free speech in the U.S. today is the First Amendment to the U.S. Constitution, which provides that “Congress shall make no law...abridging the freedom of speech, or of the press”.

¹³⁸ The importance of this balancing exercise is evident in the case of *Campbell v. MGN* [2004] HL 22; [2004] 2 AC 257, where the House of Lords highlighted the value of achieving a balance between freedom of expression and the right to respect for private life, as guaranteed under Article 8 of the European Convention on Human Rights. The Court ruled that the right of freedom of expression of the Daily Mirror newspaper to publish details of the model Naomi Campbell receiving therapy from Narcotics Anonymous did not outweigh the model's right to privacy.

¹³⁹ *R v. Shayler* [2003] 1 A.C. 247, H.L. (Held that revelation to the public of information under the Official Secrets Act 1989, was covered by the right of freedom of expression).

¹⁴⁰ Article 4 reads as follows: “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

Given the open-ended wording of the provision, it has been interpreted in many ways over the years, and the various interpretations (some more literal and restrictive than others) have been based on different free speech theories. Free speech justifications range from the establishment of democracy of self-fulfilment to the development of a 'marketplace of ideas' and the protection of the interests of opposition and minorities¹⁴¹.

It appears that the First Amendment not only empowers "speakers to speak" but embraces the right to "receive information"¹⁴². As Judge Alex Kozinski stated in *Conant v. Walters*¹⁴³, "the right to hear and the right to speak are flip sides of the same coin"¹⁴⁴. The court in *Neinast v. Board of Trustees of the Columbus Metropolitan Library*¹⁴⁵ noted that the right to receive information under the First Amendment includes "the right to some level of access to a public library, the quintessential locus of the receipt of information"¹⁴⁶.

Decisions of the US courts have clarified that free speech protection under the First Amendment is not limited to the expression of ideas and information¹⁴⁷ but extends to entertainment, including motion pictures¹⁴⁸, video games¹⁴⁹ and programs broadcast by radio and television¹⁵⁰.

¹⁴¹ For an extensive discussion of free speech justifications in the U.S. and the different interpretations accorded to the First Amendment, see Barendt, E., *Freedom of Speech* (2nd ed., Oxford University Press, 2005) at pp. 6-27 and 48-50.

¹⁴² See, for example, *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 48 L. Ed. 2d 346 (1976); *Klaundienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 33 L. Ed. 2d 683 (1972).

¹⁴³ *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

¹⁴⁴ *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring).

¹⁴⁵ *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 2003 FED App. 0363P (6th Cir. 2003).

¹⁴⁶ *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 590, 2003 FED App. 0363 P (6th Cir. 2003) quoting *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992).

¹⁴⁷ *Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

¹⁴⁸ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, 1 Media L. Rep. (BNA) 1357 (1952).

¹⁴⁹ *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, Prod. Liab. Rep. (CCH) P. 16,314, 106 A.L.R.5th 759 (D. Conn. 2002); *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954 (8th Cir. 2003). Courts however have, in some cases, held that video games are not speech or expression protected under the First Amendment on the basis that they lack sufficient expressive or informational content. See, *Malden Amusement Co., Inc. v. City of*

The Supreme Court has stated that “the First Amendment literally forbids the abridgment only of ‘speech’, but we have long recognized that its protection does not end at the spoken or written word”¹⁵¹. In determining the scope of the right of free speech, the courts have had to assess whether speech embraces conduct. In *United States v. O’Brien*¹⁵², the court ruled that the respondent’s act of burning his draft-card, as a means of communicating his opposition to conscription for the war in Vietnam, could not be characterised as speech under the First Amendment¹⁵³. The Supreme Court reached a different conclusion in the case of *Texas v. Johnson*¹⁵⁴, where it ruled that the conviction of the defendant for setting the U.S. flag on fire during a demonstration violated the First Amendment, as it constituted expressive conduct¹⁵⁵. In *City of Dallas v. Stanglin*¹⁵⁶, the court stated that “It is possible to find some kernel of expression in almost every activity a person undertakes –for example, walking down the street, or meeting one’s friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment”. Further, U.S. courts have ruled that free speech also embraces the right not to speak¹⁵⁷. The Supreme Court, in *West Virginia State Board of Education v. Barnette*¹⁵⁸, reached the conclusion that the students of a public school had the right not to be coerced into embracing beliefs they did not

Malden, 582 F. Supp. 297 (D. Mass. 1983); *America’s Best Family Showplace Corp. v. City of New York, Dept. of Bldgs*, 536 F. Supp. 170 (E.D.N.Y. 1982).

For a detailed analysis of the level of protection of video games under the First Amendment to the US Constitution, see Kemper, K.A., “First Amendment Protection Afforded to Commercial and Home Video Games” 106 A.L.R.5th 337.

¹⁵⁰ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671, 7 Media L. Rep. (BNA) 1426 (1981).

¹⁵¹ *Texas v Johnson*, 491 U.S. 397 (1989).

¹⁵² 391 U.S. 367 (1968).

¹⁵³ The case has been criticised both on the basis of the decision and the reasoning. See Nimmer, M.B., “The Meaning of Symbolic Speech under the First Amendment” (1973) 21 UCLA L. Rev. 29; Henkin, L., “On Drawing Lines” (1968) 82 Harvard L. Rev. 63; Ely, J.H., “Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis” (1975) 88 Harvard L. Rev. 1482.

¹⁵⁴ 491 U.S. 397 (1989).

¹⁵⁵ *Smith v. Goguen*, 415 U.S. 566 (1974), at 589 (“Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the first amendment.”); *Brown v. Louisiana*, 383 U.S. 131 (1966), at 142 (“First Amendment rights are not confined to verbal expression. They embrace appropriate types of action.”); *Garner v. Louisiana*, 368 U.S. 157 (1961), at 201 (“This court has never limited the right to speak...to mere verbal expression.”)

¹⁵⁶ *City of Dallas v. Stranglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L. Ed. 2d 18 (1989).

¹⁵⁷ Or act, thus covering a negative freedom.

¹⁵⁸ 319 U.S. 624 (1943).

hold. Jackson J. confirmed the students' right of free speech, in the context of religious freedom, by stating that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"¹⁵⁹.

Overall, in deciding free speech cases, the U.S. Supreme Court balances the right against other rights and principles, such as public order, national security and the right to reputation¹⁶⁰.

An important principle that the U.S. courts have developed in assessing free speech cases is that content-based restrictions on speech should be subject to strict or heightened scrutiny: governmental regulations based upon the content of speech must, in general, satisfy the strict scrutiny test¹⁶¹. As a rule of thumb, such regulations or laws will be upheld if they are justified by compelling governmental interests, and are the least restrictive means of giving effect to these interests¹⁶². At

¹⁵⁹ 319 U.S. 624 (1943), at 642. Also, see *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (editors had First Amendment right not to publish readers' replies to personal attacks); *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977) (workers, who were not trade union members, had the right not to be coerced into financing trade union political activities).

¹⁶⁰ *American Communications Ass. v. Douds*, 339 U.S. 382 (1950), at 399 (In balancing free speech against public order, "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented"); *Dennis v. United States*, 341 U.S. 494 (1951), at 524-5 ("The demands of free speech in a democratic society as well as the interests in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-euclidean problems to be solved.")

To an extent, courts will carry out this balancing exercise on a case-by-case basis. However, such an approach can lead to legal vagueness and inconsistency. Therefore, courts have, over the last eighty years, developed a list of principles which they generally adhere to in reaching their decisions.

¹⁶¹ *Schneck v. United States*, 249 U.S. 47 (1919), at 52 ("The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic...The question in every case is whether the words used...create a clear and present danger..."); *Frisby v. Schultz*, 478 U.S. 474 (1988), at 481 (Even speech that is highly protected under the first amendment can be subject to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication".)

¹⁶² *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

the other end of the spectrum, regulations that are content-neutral – not based on speech content, shall be subject to less rigorous scrutiny¹⁶³.

In general, it appears that the courts afford lesser protection to some types of speech under the First Amendment: “The Constitution...affords a lesser protection to commercial speech than to other constitutionally guaranteed expression”¹⁶⁴. Commercial speech has been defined as “speech that proposes a commercial transaction”¹⁶⁵.

Overall, free speech under the First Amendment has been the subject of extensive jurisprudence and judicial interpretation for a number of reasons. Courts have developed numerous free speech doctrines and principles in an effort to safeguard this right efficiently. In addition, free speech had occupied a central role within the American legal landscape for a longer time than, for example, in the UK, which started to develop equivalent jurisprudence with the passing of the Human Rights Act in 1998. Despite the fact that free speech in the U.S. can be viewed as complex, it has provided courts with the opportunity to develop a rich body of precedents.

2.5.4 FRANCE

The right of freedom of expression was first recognised in the French Declaration of the Rights of Man and of the Citizen of 1789. Articles 10 and 11 of the Declaration read as follows:

“No man ought to be molested on account of his opinions, not even on account of his religious opinions, provided his avowal of them does not disturb the public order established by the law.

¹⁶³ *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (content-neutral statute prohibiting the publication of illegally intercepted communications violated the First Amendment).

¹⁶⁴ *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

¹⁶⁵ *Board of Trustees of The State University of New York v. Fox*, 492 U.S. 469 (1989), at 482. In *Central Hudson Gas & Electrical Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court set out a four-tier test for determining whether commercial speech is constitutional. For a more detailed discussion, see Cohen, H., *Freedom of Speech and Press: Exceptions to the First Amendment*, CRS Report for Congress (95-815), June 2, 2006; Stone, G.R., “Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions” (1987) 46 *Univ. of Chicago L. Rev.* 81.

The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for this liberty in cases determined by the law"¹⁶⁶.

The French Constitution of 4 October 1958 does not contain express provisions on the right to freedom of expression because drafters did not attempt to enumerate fundamental rights. However, the Preamble to the Constitution recognises the attachment of the French people to the rights defined in the Declaration of 1789¹⁶⁷. In addition, Article 34 prescribes that it would be unconstitutional for the government to pass a statute circumscribing the exercise of a civil liberty, including freedom of expression¹⁶⁸.

Furthermore, the Constitutional Council ('Conseil Constitutionnel')¹⁶⁹ has, on a number of occasions held that laws must comply with the Declaration of 1789 and in particular, the right of freedom of expression safeguarded under it¹⁷⁰.

France has also ratified the European Convention¹⁷¹. The Convention occupies an intermediate status as a result of its ratification. It has a higher status than national

¹⁶⁶ Translation, Paine, T., Collins, H. and Foner, E., *Rights of Man* (Harmondsworth: Penguin, 1984).

¹⁶⁷ "The French people hereby solemnly proclaim their attachment to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the Constitution of 1946..."

¹⁶⁸ Article 34 of the Constitution of 1958 provides that "Statutes shall be passed by Parliament. Statutes shall determine the rules concerning: civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties..."

¹⁶⁹ The constitutional council was created by the Constitution of 1958. It is a permanent court with judicial and consultative powers. The decisions of the council are binding on public, administrative and judicial authorities and cannot be appealed against. For more information on the constitutional council, see Avril, P. and Gicquel, J., *Le Conseil Constitutionnel* (4th ed., Montchrestien, 1998).

¹⁷⁰ "Enterprises de Presse", Decision 84-181DC of 10-11 October 1984 (Council considered a challenge to a law limiting newspaper holdings to 15 per cent of the market and requiring transparency regarding their ownership and financing. It held that Parliament could regulate freedom of communication but should balance it against other constitutional rights and values.); Decision 86-210DC of 29 July 1986 (Council held media pluralism to be a constitutional value which could set restraints on and be balanced against other constitutional rights, such as the freedom of the press.). For a more detailed discussion of these and other similar cases, see Barendt, E., *Freedom of Speech* (2nd ed., Oxford University Press, 2005) at pp. 68-9.

legislation but a lower status than the Constitution. As such, the Convention will prevail over national legislation¹⁷².

2.5.5 GERMANY

The right to freedom of expression is protected under the "Basic Law", the German Constitution¹⁷³. Its protection has been justified on the basis that the right is necessary to protect the democratic nature of the Constitution¹⁷⁴. Article 5 of the Basic Law provides that:

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
- (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the Constitution.

It has been stated that the right of freedom of expression and opinion under the Basic Law has three distinct dimensions; an internal dimension (the formation

¹⁷¹ France ratified the Convention and the First Protocol to the European Convention on November 28, 1974.

¹⁷² For a general discussion on the status of the European Convention in domestic law see, Steiner, E., "France" in Gearty, C.A. (ed.), *European Civil Liberties and the European Convention on Human Rights* (Kluwer, 1997). See also, Bernhardt, R., "The Convention and Domestic Law" in MacDonald, R.St.J., and Matscher, F., and Petzold, H. (eds.), *The European System for the Protection of Human Rights* (Nijhoff, 1993).

¹⁷³ Grundgesetz of 23 May 1949.

¹⁷⁴ "The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all... For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible... It is in a certain sense the basis of every freedom whatsoever, 'the matrix, the indispensable condition of nearly every other form of freedom.'", "Lüth", 7 BVerfGE 198 (1958), at 208.

of an opinion), a communicative dimension (the expression of an opinion), and an external dimension (the effect of the expression of an opinion)¹⁷⁵.

The scope of the individual's right to express an opinion has been defined by the Federal Constitutional Court as follows: "[the] point of expression of opinion is to produce mental effects on the environment, to act, to mould opinion and to persuade... The protection of the fundamental right relates primarily to the speaker's own opinion... It is immaterial whether his utterance is 'valuable' or 'worthless', 'right' or 'wrong', emotionally or rationally justified..."¹⁷⁶. The Court has further clarified that hate speech is within the right's scope, "the basic right's protection also extends to the statement's form. An expression of opinion does not lose this protection by being sharply or hurtfully worded"¹⁷⁷. Despite the fact that the right to express an opinion has been held to protect assertions of fact, such right does not extend to the protection of inaccurate quotations¹⁷⁸.

However, the right of freedom of expression under German law is subject to restrictions¹⁷⁹ from general laws¹⁸⁰, provisions for the protection of young persons and the right to personal honour¹⁸¹. In general, it appears that the

¹⁷⁵ Brugger, W., "The Treatment of Hate Speech in German Constitutional Law (Part I)", (2002) 3 (12) German Law Journal, available at: <http://www.germanlawjournal.com/print.php?id=212>.

¹⁷⁶ "Election campaign", 61 BVerfGE 1 (1982), at 7.

¹⁷⁷ "Römerberg Speech", 54 BVerfGE 129 (1980), at 136.

¹⁷⁸ "[Factual] assertions are not, strictly speaking, expressions of opinion... But this does not mean that they lie outside the protective scope of Article 5(1), first sentence... Protection of factual assertions ends only where such representations cannot contribute anything to the constitutional presupposed formation of opinion. Viewed from this angle, incorrect information is not an interest that merits protection. The Federal Constitutional Court has consistently ruled therefore that protection of freedom of expression does not encompass a factual assertion that the utterer knows is, or that has proven to be true", "Auschwitz Lie", 90 BVerfGE 241 (1994), at 247. Also see "Böll", 54 BVerfGE 208 (1980), at 219.

¹⁷⁹ German Basic Law 1949, article 5(2).

¹⁸⁰ "[General laws] are to be seen as meaning all laws that do not prohibit an opinion as such, are not directed against the utterance of the opinion as such, but instead serve to protect an object of legal protection that is to be protected as such, without regard to a particular opinion, to protect a communal value taking priority over the exercise of freedom of opinion...", "Lüth", 7 BVerfGE 198 (1958), at 209.

¹⁸¹ The constitutional protection of personality is provided for under Article 2(1) of the Basic Law. A number of cases have reached the courts where freedom of expression under Article 5(3) has been balanced against the personality right. The "Strauß Caricature" case, 75 BVerfGE 369 (1987), demonstrates that although political criticism is covered by freedom of

German Constitutional Court, in assessing whether such restrictions should apply to a person's constitutional right of freedom of expression, shall have regard to the principle of proportionality¹⁸² and the importance of the relevant rights¹⁸³. The Court makes its assessment on a case-by-case basis and has not developed as yet any legal rules regarding prioritisation of specific constitutional and other rights. Each case is therefore determined on its own merits and individual facts¹⁸⁴.

expression, it does not extend to derogatory statements which are unrelated or marginal to any political message. On the facts of the case, a satirical magazine portrayed the then Prime Minister of Bavaria as a pig engaged in sexual activity in a caricature. The Federal Constitutional Court held that there was infringement of the Prime Minister's right to personality and human dignity despite the fact that the picture was a satire and thus covered by Article 5(3). The Court defined the scope of the personality right as follows:

"[What] was plainly intended was an attack on [the] personal dignity of the person caricatured. It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked 'bestial' characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being...a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayal]." (75 BVerfGE 369 (1987) at 379.

The relationship between the two constitutional rights was also the focus of the "Soldiers-Are-Murderers" (Tucholsky) case, 93 BVerfGE 266 (1995). On the facts of the case, posters and leaflets accusing German soldiers of being murderers were distributed to the public. The lower court, reversing the ruling of the Federal Constitutional Court, held that the personal honour of the soldiers had been severely attacked. However, the court did agree with part of the reasoning of the Constitutional Court, in particular that each case should be judged on its specific facts and linguistic context on an objective level: "The decisive thing is...neither the subjective intention of the utterer nor the subjective understanding of those affected by the utterance, but the meaning it has for the understanding of an unbiased, reasonable audience" (93 BVerfGE 266 (1995) at 295).

For a more detailed discussion of these and similar cases, see Brugger, W., "The Treatment of Hate Speech in German Constitutional Law (Part I)", (2003) 3(1) German Law Journal, available at <http://www.germanlawjournal.com/print.php?id=212>.

¹⁸² "While the principle of proportionality is not explicitly mentioned in the German Constitution, it forms an implicit standard gleaned from the general prioritization of personal liberty over governmental regulation", Brugger, W., "The Treatment of Hate Speech in German Constitutional Law (Part I)", (2002) 3(12) German Law Journal, available at: <http://www.germanlawjournal.com/print.php?id=212>.

The proportionality principle is also discussed in the context of the right of freedom of expression under the European Convention on Human Rights; see para. 2.5.2.3.

¹⁸³ "[Any] interpretation and application of statutes that have a limiting effect on freedom of expression must take account of that freedom's significance", "Auschwitz Lie", 90 BVerfGE 241 (1994), at 248.

¹⁸⁴ "Soldiers are Murderers", 93 BVerfGE 266 (1995), at 294. However, Courts have developed some rules for case-specific balancing, in particular when assessing the right of personality vis-à-vis freedom of expression. See "Holocaust Denial", 90 BVerfGE 241 (1994), at 248 ("Freedom of opinion by no means always takes precedence over protection of personality... Rather, where an expression of opinion must be viewed as a formal criminal insult or vilification, protection of personality routine comes before freedom of expression.

Germany has also ratified the European Convention on Human Rights 1950¹⁸⁵. In Germany, the Convention automatically becomes part of the law and takes precedence over existing national legislation¹⁸⁶.

2.6 SUMMARY

It appears that freedom of expression is considered to be an important right. It is recognised in every principal human right instrument at the international, regional and national levels. Although the interpretation of the right's scope can vary among different levels and national laws, the basic justifications underpinning its widely recognised value and preservation are generally uniform;

“Freedom of expression is, of course, intrinsically important: it is value for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes, J. (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition market’¹⁸⁷. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country”¹⁸⁸.

Where expressions of opinion are linked to factual assertions, the protection merited can depend on the truth of the underlying factual assumption. If these assumptions have been proven untrue, freedom of expression will routinely yield to personality protection. Otherwise, the issue is which legal interest deserves protection in that specific case. Even then, it must be recalled that presumption in favour of free speech applies concerning issues of essential importance to the public.”).

¹⁸⁵ Germany ratified the Convention on December 5, 1952 and the First Protocol to the European Convention on February 13, 1957.

¹⁸⁶ For a discussion of the status of the European Convention on Human Rights in Germany, see Voss, E., “Germany” in Gearty, C.A. (ed.), *European Civil Liberties and the European Convention on Human Rights* (Kluwer, 1997).

¹⁸⁷ *Abrams v. United States*, 250 U.S. 616 (1919), at 630, per Holmes, J. (dissenting).

¹⁸⁸ *R v. Secretary of State for the Home Department, ex parte Simms* [1999] 3 W.L.R. 328, at 337, per Lord Steyn.

Given the relevance of freedom of expression in the context of copyright, the rights of the author to express his personality and intellect in a specific manner and protect his very expression, it is surprising that freedom of expression does not occupy a more influential position within copyright. It could be beneficial for the legal body of copyright to echo some of the fundamental principles that underlie freedom of expression as a human right in order to enhance its aspiring universal and non-discriminatory character. This may be achieved by expressly recognising the right of freedom of expression and the need to balance it against the author's copyright in the Berne Convention. The thesis puts forward detailed proposals regarding the way that such a revision of the Convention can be effected.

CHAPTER 3

Moral Rights and Freedom of Expression: General Areas of Potential Conflict

3.1 GENERAL OVERVIEW

This Chapter consists of an enquiry into the relationship of an author's moral rights and another party's right of freedom of expression. This relationship is examined on the international, regional and national levels in order to ascertain whether and, if so, under what circumstances, there can be instances of conflict or overlap between the two sets of rights.

As far as moral rights are concerned, there is a degree of variation in the number of such rights vested in the author, not only among various levels but also among national laws¹. It is suggested that for the purposes of the thesis analysis, the moral rights of paternity and integrity are relevant and are thus examined in detail². For the purposes of the thesis analysis, the moral right of paternity is examined in the context of the author's right against false attribution as it is suggested that the right of the author to be identified as the author of a work, which is also part of his paternity right, does not appear to give rise to

¹ For a discussion of the various moral rights vested in an author at the international, regional and national levels, see para. 1.3.2.3.

² Two other moral rights that are vested in the author, in some national laws, but not examined in this Chapter are the author's rights of divulgation and retraction.

The divulgation right is the author's right to decide when, where and in what form his work will be divulged to other persons. The right is provided for in the national copyright laws of France (French Intellectual Property Code, article L. 121-2)) and Germany (Author's Right and Related Protection Rights Law 1965, article 12(1)).

The retraction right is the right of the author to withdraw his work from publication. The right is recognised in the national copyright laws of France (French Intellectual Property Code, article L. 121-4) and Germany (Author's Right and Related Protection Rights Law 1965, article 12(2)).

For the purposes of the thesis, it is suggested that neither of these rights can give rise to situations of conflict with freedom of expression, and are thus not analysed in the Chapter.

For a discussion of the rights of divulgation and retraction, see Sterling at pp. 340 and 343.

situations of conflict with another party's freedom of expression. Case law concerning the interaction between the moral rights of paternity and integrity and freedom of expression does not appear to have developed, but the Chapter attempts to analyse their respective relationship on the basis of existing case law and the potential judicial approach to and interpretation of hypothetical situations of conflict between the rights.

This Chapter is primarily designed to provide a comprehensive answer to the following question: Are there or can there be circumstances where the author's invoking of his moral rights of paternity and integrity in his work can interfere with or otherwise restrict another party's freedom of expression and vice versa? If such conflicts can be established or potential conflicts foreseen, they could amount to a serious gap in the present national laws, such conflicts going to the heart of the relations between the author, the party using his work and the general public.

3.2 CASES FOR COMPARISON

In the thesis, a number of hypothetical "standard" cases³ are taken for the purpose of comparison at various levels, namely:

The Secret Diaries Case

A is a well-known comedienne, and the author of a published work on the historical development of comedy, and of a published collection of diary entries, documenting aspects of her public and private life, written in an entertaining and humorous style.

B, a newspaper proprietor, publishes a series written by his employee C and comprising parodies of A's diaries. Each article is entitled "A's Secret Diary" and prominently features a photograph of A. Underneath, there is an introductory paragraph identifying C as the author of the diaries, and containing C's name in capital letters, together with a short statement that the diary entries are C's imaginary description of how A would record her daily life. The diary entries refer to current events, and are at times written in an exaggerated style in order to depict the satirical nature of the series.

³ For the purpose of the present analysis, infringement of economic rights is not taken into consideration, this aspect being considered in Chapter 3.

The Paris Novel Case

D is the author of a well-known fictional novel. The novel's central theme is the friendship of a group of adolescents with physical disabilities in Paris. Through its storyline, the play depicts their carefree daily lives and the adventures they embark on in order to achieve their dream of visiting all the historical landmarks of the city.

E is the author of a parody novel. In his work, E uses some scenes and a number of original characters from D's novel. E's work criticises D's novel in its depiction of the everyday life of people with disabilities and, in turn, portrays the struggles and discrimination that people with mobility restrictions face on a daily basis.

3.3 COMPARISON AT INTERNATIONAL LEVEL

On the international level, freedom of expression is guaranteed under the Universal Declaration of Human Rights⁴ and the International Covenant on Civil and Political Rights⁵ while Article 6*bis* of the Berne Convention⁶ safeguards the author's moral rights, including the moral rights of paternity and integrity⁷.

3.3.1 PATERNITY RIGHT AND FREEDOM OF EXPRESSION

In considering situations of potential conflict between the author's attribution right and another party's right of freedom of expression, this section considers the attribution, within the context of the Berne Convention, as encompassing:

- i. The right to assert that the author is the work's creator,

⁴ The Universal Declaration and the scope of freedom of expression under its provisions are discussed in para. 2.3.2.

⁵ The International Covenant on Civil and Political Rights and the scope of freedom of expression under its provisions are discussed in para. 2.3.3.

⁶ This section will not consider the following international copyright instruments for the reasons that are briefly given: (1). Universal Copyright Convention 1956 (contains no moral rights provisions); (2). Rome Convention 1961 (authors of works are not beneficiaries of protection); (3). Phonograms Convention 1971 (authors of works are not beneficiaries of protection); (4). TRIPS Agreement 1994 (contains no express provisions on moral rights and states that the Berne Convention provisions on moral rights (Article 6*bis*) shall not be binding (Article 9)); (5). WIPO Performances and Phonograms Treaty 1996 (authors of works are not beneficiaries of protection).

The moral rights provisions under the Berne Convention are also examined in para. 1.3.2.3.

⁷ Contracting Parties to the WIPO Copyright Treaty must also comply with this Article. See WIPO Copyright Treaty 1996, Article 1(4).

- ii. The right to publish anonymously or pseudonymously, with the option of later changing his mind and abandoning anonymity, and
- iii. The right to prevent use of his name with reference to a work that he did not create⁸.

On the facts of *The Secret Diaries* case⁹, A will claim that her right, under the Convention, to prevent use of her name with reference to a work that she did not create has been violated. The court will have to assess whether C's diary entries mislead the average reader as to their source of origin. If the court finds that A's paternity right has been infringed, B will have no defence available to him under the Berne Convention. The fair use defence under Article 10*bis*(2) appears to be restricted to infringement of the author's economic rights, and no parody defence is provided for under the Convention.

Alternatively, B could invoke his right of freedom of expression as a defence *per se*. It is difficult to predict how a court would decide *The Secret Diaries* case in this context. The Convention does not expressly make provision for such a defence or exception, while case law involving an alleged infringement of the author's paternity right and another party's freedom of expression under international human rights instruments appears to be lacking.

The Berne Convention, like the Universal Declaration and International Covenant on Civil and Political Rights, is an instrument whose primary purpose is to set minimum standards of copyright protection, which its country members must observe¹⁰. Consequently, each country has formulated its own copyright/author's right and human rights legislation and this may provide authors and other parties alike with greater protection than that afforded under the respective international instruments. It would therefore appear that a person wishing to claim that his freedom of expression is being stifled by an author's paternity right could find no basis for this claim under the Berne Convention but would have to rely on the relevant national law, depending on the circumstances of the individual case. It would be unsound to reach any

⁸ These three branches of the Berne paternity right are elaborated on in the World Intellectual Property Organization, *Guide to the Berne Convention* 41 (1978). For a discussion of the author's paternity right under Article 6*bis* of the Berne Convention, see para. 1.3.2.3.

⁹ For the facts of the case, see para. 3.2.

¹⁰ The same is, to an extent, true for the Universal Declaration on Human Rights.

conclusions on the rights relationship under such general provisions and lack of judicial guidance and interpretation.

3.3.2 INTEGRITY RIGHT AND FREEDOM OF EXPRESSION

Under Article 6bis(1) of the Berne Convention, the author's right of integrity is defined as the author's right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation"¹¹.

In order to determine whether any "distortion, mutilation or other modification of, or other derogatory action" in relation to the author's work has taken place a court may employ a subjective test¹². The fact that a court may take into account the author's view as to whether he considers his work to have been distorted or mutilated in any way widens the scope of the scope of his right. This is however to be balanced against the limiting objective nature of the test determining prejudice to the author's honour or reputation.

On the facts of *The Paris Novel* case¹³, D will claim that his work has been distorted as a result of E's novel and thus his integrity right infringed. As the test for proving distortion of a work under the Berne Convention is subjective, it is likely that D will succeed in arguing that there has been some distortion of his original work. However, the court will then have to assess whether D's honour or reputation, both as a creative author and a person, has been prejudiced. That will be assessed on an objective basis. Thus, a court would probably examine whether as a result of E's novel, members of the public could develop a lowered opinion of D. On the present facts, it would appear that although the author's creative reputation – i.e. the technical aspect of his authorship – might remain unaffected, it is likely that his personal reputation will suffer, his qualities of judgment and perception might come under attack¹⁴.

¹¹ Note that the integrity right does not, in contrast to some continental jurisdictions, encompass the author's right to object to the destruction of his work. See Ricketson and Ginsburg at p. 605.

¹² This approach is similar to that found in the moral rights provisions of France. See para. 3.5.4.2.

¹³ For the facts of this (hypothetical) case, see para. 2.2.

¹⁴ However note that "it appears too difficult and indeed perhaps theoretically unsound to distinguish between an author's 'creative' and 'personal' reputations", Griffiths, J., "Not Such A 'Timid Thing': The UK's Integrity Right and Freedom of Expression" in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths and Suthersanen (eds.), Oxford University Press, 2005) at pp. 325-28.

If one assumes that the court finds infringement of D's integrity right, defences available to E should be examined. The Berne Convention does not specifically provide for any defence to the infringement of an author's integrity right. Article 10*bis*(2) provides for a fair use defence but its application appears to be restricted to infringement of the author's economic rights and not extend to his moral rights. In addition, as mentioned, no parody defence is recognised in the Convention.

Alternatively, E could invoke his right of freedom of expression as a defence *per se* to D's infringement claim. The Berne Convention does not provide for such a defence or exception. Furthermore, there appears to be no developed case law on this subject on an international level. It is therefore difficult to predict whether a court would take such an argument into account and balance it against D's integrity right, and how such a case would ultimately be decided by a court. However, if the freedom of expression defence is dismissed, and given the lack of any other statutory defences open to E, it appears that E might be held to have infringed D's right.

The Berne Convention, as the Universal Declaration and International Covenant on Civil and Political Rights, is an instrument whose primary purpose is to set minimum standards of copyright protection, which its Member States must observe¹⁵. Consequently, each country has formulated its own copyright and human rights legislation and this may provide authors and other parties alike with greater protection than that afforded under the respective international instruments. It would therefore appear that a person wishing to claim that his/her freedom of expression is being stifled by an author's integrity right could find no basis for this claim under the Berne Convention but would have to rely on the relevant national law, depending on the circumstances of the individual case. In conclusion, it would be unsound to reach any conclusions on the rights relationship under such general provisions and lack of judicial guidance and interpretation.

¹⁵ The same is, to an extent, true for the Universal Declaration on Human Rights.

3.4 COMPARISON AT REGIONAL LEVEL

A comparison of the respective copyright and human rights instruments can be made in the context of the relationship between the author's moral rights and freedom of expression within the American region, but not in Europe and Africa where there are no general regional copyright agreements.

In the American region, the main copyright instruments are NAFTA and Cartagena Decision 351¹⁶. However, moral rights are only recognised under Cartagena Decision 351 since NAFTA does not oblige its Member States to protect the author's moral rights¹⁷. The human right of freedom of expression is guaranteed under the American Convention on Human Rights 1969¹⁸.

The author's right of paternity under the Cartagena Decision 351 appears to be worded broadly. Article 11(b) provides for the author's right to claim authorship of the work at any time. There are no express limitations imposed on the right and there are no prerequisites that must be satisfied for the author to claim authorship. It is unclear whether the author's paternity right embraces his right to publish or disseminate his work anonymously or pseudonymously. It is also unclear whether the paternity right embraces the three circumstances included in those covered by Article 6*bis*(1) of the Berne Convention¹⁹.

Under Article 11(c) of the Cartagena Decision 351, an author has the right to "object to any distortion, mutilation or alteration of the work that is prejudicial to the integrity thereof or to the reputation of the author".

The Cartagena Decision 351 is generally consistent with the TRIPS Agreement and the Berne Convention, with questions nevertheless arising regarding waiver of moral rights. However, it is generally considered to serve as a tool for integration within the Andean Community and for setting the stage for further enhancement of intellectual property protection. Each of its member countries²⁰ has developed its own copyright legislation, safeguarding, among other rights, the author's moral rights. As such, case law on moral rights under this

¹⁶ A brief description of these instruments is set out in para. 1.4.2.2.

¹⁷ NAFTA, Annex 1701.3.

¹⁸ Article 13. For a discussion of the Convention and the scope of freedom of expression under Article 13, see para. 2.4.3.

¹⁹ The author's paternity right under the Berne Convention is examined in paras. 1.3.2.3 and 3.3.2.

²⁰ Bolivia, Colombia, Ecuador, Peru, Venezuela (subject to confirmation).

instrument over the years has been sparse. Thus, for the purposes of the present examination, Cartagena Decision 351 cannot provide an adequate forum for examining the interaction between moral rights and freedom of expression. Any cases regarding such issues shall generally arise on a national level instead. In conclusion, it would be unsound to reach any conclusions on the rights relationship under such general provisions and lack of judicial guidance and interpretation.

3.5 COMPARISON AT NATIONAL LEVEL

3.5.1 INTRODUCTION

This Part examines the relationship between the author’s moral rights of paternity and integrity and another party’s right of freedom of expression on a national level. The countries whose laws are analysed are: the United Kingdom, the United States of America, France and Germany.

In order to provide a general overview of the rights’ relationship, the following paragraphs examine:

- (i) whether freedom of expression is or could be effectively accommodated within the framework of existing legislative moral rights provisions and limitations to such provisions, and
- (ii) whether freedom of expression *per se* is afforded sufficient recognition as an actual or potential limitation to the author’s moral rights.

The following Tables summarise the relevant rights and legislative provisions that are considered under each national law.

United Kingdom		
False Attribution Right	Integrity Right	Freedom of Expression
CDPA 1988, section 84	CDPA 1988, sections 80-83	HRA 1998, section 12 ECHR 1950, Article 10

United States		
Paternity Right	Integrity Right	Freedom of Expression
Copyright Act 1976, section 106A	Copyright Act 1976, section 106A	American Declaration of 1948, Article 4 First Amendment to the US Constitution

France		
Paternity Right	Integrity Right	Freedom of Expression
French Intellectual Property Code 1992, article L.121-1	French Intellectual Property Code 1992, article L.121-1	French Declaration of 1789, Articles 10, 11 French Constitution of 1958, Preamble ECHR 1950, Article 10

Germany		
Paternity Right	Integrity Right	Freedom of Expression
Author's Right and Related Protection Rights Law 1965, article 13	Author's Right and Related Protection Rights Law 1965, article 14	German Basic Law 1949, Article 5 ECHR 1950, Article 10

3.5.2 UNITED KINGDOM

3.5.2.1 FALSE ATTRIBUTION AND FREEDOM OF EXPRESSION

The author's paternity right under the CDPA 1988 is defined as the right to be identified as the author of a copyright work (or director of a film)²¹. The Act also provides for the author's right to have a work published anonymously, pseudonymously or using some other particular form of identification²². In the Act, the right concerning false attribution is recognised as a distinct moral right separate from that of paternity, and is defined as the right not to have a copyright work falsely attributed to an author (or a copyright film falsely attributed to a director)²³. It is submitted that it is the right of the author not to have a copyright work falsely attributed to him; this may give rise to potential

²¹ CDPA 1988, section 77(1).

²² CDPA 1988, section 77(8).

²³ CDPA 1988, section 84. For a detailed analysis of the nature of the paternity right, see para. 1.3.2.3.

conflicts with an individual's right of freedom of expression²⁴. Thus, it is only in this context that the author's "paternity right"²⁵ is examined in this paragraph.

The right concerning false attribution applies to literary, dramatic, musical and artistic works and to films²⁶. The right also applies to adaptations of literary, dramatic and musical works and to copies of artistic works that are falsely represented as being copies made by the author of the artistic work²⁷. Unlike the paternity right, the right concerning false attribution does not have to be asserted²⁸. Similarly, there are no exceptions or defences to this right.

Since the early years of the nineteenth century, the law of passing off and defamation²⁹ have afforded authors protection against false attribution of authorship³⁰. More recently, the court addressed the issue of this right's infringement in the case of *Clark v. Associated Newspapers Ltd*³¹. On the facts of the case, Alan Clark MP brought an action against the *London Evening Standard* and invoked two rights to protection from false attribution, one statutory, under section 84(1)(a) of the CDPA 1988, and one common law, under the law of passing off. The newspaper published a "spoof" diary based on what a journalist imagined that Alan Clark might record in his diary. The article

²⁴ It is hereby suggested that the other two rights embraced by the author's paternity right, although capable of being infringed within the context of copyright law, cannot give rise to conflicts with another party's freedom of expression if infringed.

²⁵ In most international, regional and national laws, the false attribution right is treated as part of the author's paternity right. The United Kingdom is the sole country examined in the thesis that clearly separates the two rights.

²⁶ CDPA 1988, section 84(1).

²⁷ CDPA 1988, section 84(8).

²⁸ CDPA 1988, sections 77(1) and 78.

²⁹ *Moore v. News of the World* [1972] 1 Q.B. 441. In this case, Mrs. Edna May Moore alleged that an article that appeared in the News of the World newspaper infringed her false attribution right (under section 43 of the Copyright Act 1956) and was defamatory. The article was claimed to be an interview of Mrs. Moore to a newspaper journalist and was headed 'How My Love For The Saint Went Sour'. The jury awarded the plaintiff damages both for false attribution and libel.

³⁰ *Marengo v. Daily Sketch and Sunday Graphic Ltd.* (1948) 65 R.P.C. 242 (The plaintiff was a well-known cartoonist using the pseudonym 'Kem' and the defendant published the work of another cartoonist using the pseudonym 'Kim' but without the dot over the 'i'. Lord Simonds stated that "In a passing-off action the persons whose evidence is most cogent are those who, because they know only the plaintiff's goods, are the most easily deceived by the similarity of the defendant's goods and it is from that deception that the plaintiff is entitled to be protected". *Id.* at 250); *Moore v. News of the World Ltd.* [1972] 1 Q.B. 441 (News of the World published an article under the headline 'The Girl Who Lost the Saint. When Love Turns Sour by Dorothy Squires talking to Weston Taylor.'. The plaintiff claimed that the words in the article were wrongly attributed to her, when in fact they were the words of Weston Taylor. The jury found that the article did pretend to be written by Dorothy Squires. A breach of the tort was held to have been committed.).

³¹ [1998] 1 W.L.R. 1558.

was headed 'Alan Clark's Secret Political Diaries' and included a picture of Clark. The introductory paragraph of the article did however identify the newspaper journalist as the author.

The court clarified that section 84 of the CDPA 1988 confers a right on everyone not to have authorship of a literary work attributed to him: "Two distinctive features of the statutory tort are: (a) that it is unnecessary that the plaintiff be a professional author and accordingly that he has any goodwill or reputation as an author to protect or which may be damaged by false attribution; and (b) consequently the tort is actionable per se without proof of damage"³². It held that the defendants had violated both rights and that in order to decide whether deception as to the author's identity had taken place the article in question had to be viewed as a whole. The court then went on to assess whether, in this context, a substantial number of readers of the article would be misled as to its author. So long as a reasonable reader would understand that the articles in question were a false attribution of authorship to A, it would be likely that the court would hold that false attribution has been established – "The headings of the articles contain a clear and unequivocal false statement attributing their authorship to the plaintiff, and the vice of this statement is not cured by the various counter-messages relied on by the defendant"³³.

On the facts of *The Secret Diaries* case³⁴, A will bring a claim of infringement of her moral right of paternity against B under section 84(1) of the CDPA 1988. Based on the ruling of the *Clark*³⁵ case, it appears that, so long as a reasonable reader would understand that A had authored the diary entries, the court would find in favour of A. Even though the newspaper diaries included an introductory paragraph identifying C as the author, the fact that the article was entitled "A's Secret Diary" and was accompanied by A's picture would seem to suggest that the average reader would assume that A was the author. If the court accepted this to be the case, B would not be able to rely on a defence since there are no statutory exceptions to the author's false attribution right.

³² [1998] 1 W.L.R. 1558, at 1565 *per* Lightman J..

³³ [1998] 1 W.L.R. 1558, at 1572.

³⁴ The facts of this hypothetical case are set out in para. 3.2.

³⁵ [1998] 1 W.L.R. 1558

However B could invoke his right of freedom of expression as a defence to A's false attribution infringement claim. There is no such statutory defence in the CDPA and case law on the subject appears to be limited. Nevertheless, the *Clark* case³⁶ did make explicit reference to the right of freedom of expression in the context of an infringement of the author's false attribution right, highlighting that there is no parody defence *per se*. Lightman J. stated that:

"I should consider, if only to brush aside, one argument addressed to me by ... counsel for the defendant, in respect of both claims by the plaintiff. [Counsel] invoked article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom, which provides that everyone shall have the right to freedom of expression, and he waxed eloquent on what he denigrated as an attempt by the plaintiff in this action to interfere with the right of the defendant to publish parodies. This argument is totally misconceived. First, there is no interference with the defendant's freedom of expression. The right of the defendant to parody the works of the plaintiff has never been in question and could never be in question. Secondly, article 10(2) of the Convention of 1953 spells out that the citizen's right to freedom of expression is subject to the rights of others, and these must include the rights which the plaintiff seeks to enforce in this action. The only limitation on the defendant's freedom is in respect of the presentation or packaging of the parody. The defendant is required to respect the right of the plaintiff to object to false attribution of authorship"³⁷.

If one were to rely on the judgment of the *Clark* case in order to ascertain courts approach to a defendant's freedom of expression defence to moral right infringement it would appear that it does not allow a wide margin of appreciation for this right³⁸. The court in *Clark* arguably demonstrated great reluctance to

³⁶ [1998] 1 W.L.R. 1558.

³⁷ [1998] 1 W.L.R. 1558, at 1566.

³⁸ The *Alan Clark* case has received mixed reactions. See Thorne, C.D., "The Alan Clark Case – What It Is; What It Is Not" (1998) 20(5) E.I.P.R. 194 ("[The Alan Clark case] is to be welcomed as a responsible decision. It demonstrates that the existing law has remedies and that perhaps the vocal clamour for further legislation to curtail the press and introduce a tort of privacy is unjustified." at 196). Cf. Harrison, R., "Pastiched-Off" (1998) 9(5) Ent. L. Rev. 181 ("The decision has given judges a further opportunity to extend passing-off beyond its role in protecting commercial goodwill into a wider economic tort with affinities with defamation. It has made the confusion test easier for plaintiffs to surmount because little is done to test precisely how, why and with what

acknowledge that freedom of expression could come into play in situations of infringement and that the balancing of the two rights could be a welcome feature of the law. Likewise, Lightman J. appears to have refused to acknowledge the possibility of any conflicts existing or arising between the two rights. If the defendant's argument of freedom of expression was characterised as "totally misconceived", it could be argued that the likelihood of conflict between the author's false attribution right and an individual's freedom of expression is high.

3.5.2.2 INTEGRITY RIGHT AND FREEDOM OF EXPRESSION

Under the provisions of the CDPA 1988, the author's right of integrity³⁹ has often been described as somewhat limited in nature. Criticism has focused upon the extensive qualifications and exceptions to the right, the limited scope of the right itself and the fact that the right can be easily waived⁴⁰.

Section 80 only prohibits the "derogatory treatment" of a work which is more narrowly defined than "... any distortion, mutilation or other modification of, or other derogatory action in relation to the ... work", as provided in Article 6*bis* of the Berne Convention⁴¹. It is generally accepted that the author's integrity right can only be breached where the structure of the work has been altered; the placing of the work itself in a prejudicial/controversial environment or context will generally not breach the author's right⁴².

Unlike other jurisdictions, UK law does not provide for defences to a claim for infringement of the integrity right; there is no defence equivalent to that of fair dealing in an action for infringement of copyright. In cases where the work is found to have been subjected to derogatory treatment "the motive or purpose for carrying out the prohibited act does not appear to afford any defence"⁴³.

justification the relevant witnesses are confused. If Lightman J.'s decision is followed, we risk giving in to a culture where we are all treated as morons in a hurry" at 186).

³⁹ For a discussion of the author's integrity right under section 80 of the CDPA 1988, see para. 1.3.2.3.

⁴⁰ For a more extensive analysis, see Ginsburg, J.C., "Moral Rights in a Common Law System" [1990] 1(4) Ent. L. Rev. 121; Stamatoudi, I., "Moral Rights of Authors in England: The Missing Emphasis on the Creators" [1997] IPQ 478 and Barron, A., "Copyright Law and the Claims of Art" [2002] IPQ 368.

⁴¹ For an analysis of the scope of the integrity right under the Berne Convention, see para. 1.3.2.3.

⁴² See Griffiths, J., "Not Such A 'Timid Thing': The UK's Integrity Right and Freedom of Expression" in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths and Suthersanen (eds.), Oxford University Press, 2005).

⁴³ Laddie et al., *The Modern Law of Copyright And Designs* (3rd ed., Butterworths, 2000).

The right's limited scope appears to be reinforced by the apparently sparse UK case law. Section 80 has seemingly only been considered in four reported cases⁴⁴, while it appears not to have succeeded following a full trial.

Despite the criticism the integrity right has attracted, there can be circumstances where the right does afford strong protection to authors and directors. It is under such circumstances that any potential conflict between the author's integrity right and another party's right of freedom of expression might arise.

On the facts of *The Paris Novel* case⁴⁵, D will bring a claim against E for infringement of his moral right of integrity. In order for D to succeed in his claim, he will have to establish that E subjected his work to derogatory treatment. It is arguable that there has been "treatment" of D's novel, since E has not only made use of D's plots and characters, but has added to and altered D's work. If the court accepts this argument, E will have committed an infringing act under section 80(3)(a) of CDPA 1988 by publishing commercially a derogatory treatment of D's work. The court will then have to assess whether D's honour or reputation has been prejudiced by such a distortion of his work. This issue will be decided objectively: "the treatment accorded to his work is either a distortion or mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author is himself aggrieved by what has occurred"⁴⁶. On the present facts, it is arguable that E has, to an extent, distorted D's novel. A considerable proportion of the public, having read E's novel, may have developed an unfavourable, or even negative opinion of D and his work. Thus, it is likely that an English court would rule that D's work was subjected to derogatory treatment, thereby infringing D's integrity right.

⁴⁴ *Morrison Leahy Music Ltd v. Lightbond Limited*, [1993] E.M.L.R. 144 (The production of a sound recording from a medley of lyrics and music from other songs could potentially amount to derogatory treatment. However, the issue was never decided as the case did not reach full trial); *Tidy v. Trustees of the Natural History Museum*, [1996] 39 IPR 501 (a reproduction of drawings in reduced size did not distort the original drawings); *Pasterfield v. Denham*, [1999] F.S.R. 168 (reproduction of an artist's drawing in a leaflet altering its details and colours did not amount to derogatory treatment, the allegedly distorting changes and omissions being minor); *Confetti Records v. Warner Music UK Ltd.*, [2003] E.M.L.R. 35 (a rap song super-imposed on a track allegedly referring to violence and drug-taking did not constitute derogatory treatment of the original track as it could not be demonstrated that the composer's honour or reputation had been prejudiced).

⁴⁵ For an analysis of the facts of this hypothetical case, see para. 3.2.

⁴⁶ *Pasterfield v. Denham* [1999] F.S.R. 168, at 182.

If the court upholds D's claim, it appears that none of the defences available under section 81 of the CDPA 1988 will be open to E. It is possible that E would resort to relying on the provision of section 81(3), which allows for a defence of "reporting current events". However, it is unlikely that the court would accept that an effort to describe the difficulties faced by people with disabilities through a work of fiction could amount to a report of "current events". In addition, the CDPA does not provide for a parody defence to an integrity right infringement claim, which E could have relied upon as his novel is primarily a parody of D's work.

Alternatively, E could rely on his right of freedom of expression as a defence to D's claim of moral right infringement. There appears to be no case law to present where the relationship between the integrity right and freedom of expression has been considered. The closest UK courts have come to comment upon the potential interaction between copyright (as opposed to the integrity right) and freedom of expression was in *Ashdown v. Telegraph Group Ltd.*⁴⁷ On the relationship of the respective rights, the Court ruled in favour of the copyright owner rejecting the claim that copyright does not accommodate the right to freedom of expression. The court's reasoning and conclusion could also arguably be applicable to the author's moral rights. Even though the Court of Appeal stated that "copyright is antithetical to freedom of expression", it proceeded to emphasise the narrowness of the statement: "Rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the court to look closely at the facts of individual cases (as indeed it must whenever a fair dealing defence is raised). We do not foresee this leading to a flood of litigation"⁴⁸.

The Court of Appeal's approach appears to suggest that not only does copyright not clash with freedom of expression, but that it promotes and is capable, within its current framework, of accommodating freedom of expression.

⁴⁷ [2002] Ch. 149. For an extensive discussion of the facts of, and ruling in, the case see para. 4.5.2.1.

⁴⁸ [2002] Ch. 149, at para. 45.

In conclusion, the courts reluctance to safeguard freedom of expression specifically vis-à-vis moral rights infringement claims, coupled with the lack of a fair dealing or a statutory parody defence, appears to suggest that conflicts between the two sets of rights can possibly arise. It is difficult to ascertain any circumstances within this national copyright regime under which a party's freedom of expression would take precedence over the author's integrity right.

3.5.3 UNITED STATES OF AMERICA

3.5.3.1 PATERNITY RIGHT AND FREEDOM OF EXPRESSION

i GENERAL PRINCIPLES

Before the enactment of the federal Visual Artists Rights Act (VARA) 1990 by Congress, and in the absence of specific legislation⁴⁹, US courts have at times afforded protection to interests analogous to moral rights through extending common law rights or through an expansive interpretation of particular statutory rights, such as trademark laws.

In examining situations of potential conflict between the author's attribution (or paternity) right and another party's right of free speech in the context of general legal principles, this section considers the attribution right as encompassing:

- i. The right to be credited as the author of the work, and
- ii. The right to prevent use of the author's name in relation to a work that he did not create.

As far as the author's right to be credited as the author of a work is concerned, the right has been upheld by courts under contract law⁵⁰ and the tort of reverse passing off⁵¹. *Dastar Corp. v. Twentieth Century Fox Film Corp.*⁵², can be

⁴⁹ For a discussion of the development of moral rights in the United States of America and their distinct protection under general principles of law and VARA, see para. 1.3.2.3.

⁵⁰ *Luster Enters., Inc. v. Twentieth Century-Fox Film Corp.*, 156 U.S.P.Q. 422 (S. Ct. N.Y. County 1967) ("Credits run off on the screen immediately prior to or after the showing of the story portion of the film are of more interest to the industry than to the public. Adequate opportunity will exist, if this case is expeditiously processed, to ensure publication of plaintiff Winston's authorship of the idea to the industry if she is ultimately held entitled to such credit.").

⁵¹ However, see *Luster Enters., Inc. v. Twentieth Century-Fox Film Corp.*, 156 U.S.P.Q. 422 (S. Ct. N.Y. County, 1967) ("Credits run off on the screen immediately prior to or after the showing of the story portion of the film are of more interest to the industry than to the public. Adequate opportunity will exist, if this case is expeditiously processed, to

described as the leading case in the context of requiring use of the author's name and appears to illustrate the limited nature of protection afforded to this right. In this case, the Supreme Court considered for the first time the doctrine of reverse passing off⁵³ and held that vis-à-vis works in the public domain there is no Lanham Act⁵⁴ obligation to credit the original creator or copyright owner as the "origin of the work"⁵⁵. Overall, the decision appears to limit the availability of moral rights claims under the Lanham Act⁵⁶ by stating that the purpose of the Congress passing the Visual Artists Right Act 1990 was to confer affirmative rights to claim attribution: "Recognizing a §43(a) cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided⁵⁷". Given the limited scope of application of this right, it is not likely that it would give rise to situations of conflict with the right of freedom of expression.

For the purposes of this analysis, the right of the author against false attribution is more likely to lead to such situations of conflict. The use of the author's name

ensure publication of plaintiff Winston's authorship of the idea to the industry if she is ultimately held entitled to such credit.").

⁵² 539 U.S. 23 (2003).

⁵³ The *Dastar* case seems to override the previous case of *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) on reverse passing off. The Ninth Circuit held that there would be a Lanham Act remedy to a published work where the author's name and attribution was omitted by the new publisher of the work. For a more extensive discussion of the case, see Nimmer, M.B., Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-) at para. 8D.03[A][2][a].

⁵⁴ For a detailed discussion of §43(a) of the Lanham Act in the context of the author's moral rights, see Suhl, N.C., "Moral Rights Protection in the United States under the Berne Convention: A Fictional Work?" (2002) 12 Fordham Intell. Prop. Media & Ent. L.J. 1203; Kwall, R.R., "The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(a)" (2002) 77 Wash. L. Rev. 985.

⁵⁵ For a discussion of the interpretation of "origin" in this case, see para. 1.3.2.3 (Moral Rights under US law – Protection under general principles).

⁵⁶ §43(a)(1) of the Lanham Act provides as follows: "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act".

⁵⁷ 539 U.S. 23 (2003), at 35.

in relation to a work that he did not create⁵⁸ has been held to be wrongful under several legal principles, including contract law⁵⁹, unfair competition⁶⁰, defamation⁶¹, the right of privacy⁶² and section 43(a) of the Lanham Act⁶³.

Infringement of the right appears to depend on whether, and if so, to what extent, the author's work has been altered or distorted. If the author's work is

⁵⁸ *Clevenger v. Baker, Voorhis & Co*, 8 N.Y.2d 187, 168 N.E.2d 643 (1960), *appeal denied*, 9 N.Y.2d 755, 214 N.Y.S.2d 736 (1961); *Geisel v. Poynter Prods., Inc.*, 283 F. Supp. 261 (S.D.N.Y. 1968), 295 F. Supp. 331 (S.D.N.Y. 1968); *Clemens v. Belford, Clark & Co*, 14 F. 728 (C.C.N.D. Ill. 1883). For a more extensive list of cases, see Nimmer, M.B., Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-), para. 8D.03[B].

⁵⁹ *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952).

⁶⁰ Under unfair competition law, it has been held wrongful to pass off the work of an individual as that of an author. See, *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (even when the author assigns or licenses a work granting the right to make reasonable changes to his work, it is an actionable wrong to credit the author as the creator of the work, without his consent, if the has been the subject of extensive changes that render the new work a departure from the author's original creation). Cf. *Carte v. Ford*, 15 F. 439 (C.C.D. Md. 1883) (when the author assigns or licenses a work granting the right to make reasonable changes to his work and the changes substantially alter the original creation, a prominent notice clarifying the portions written by the author and those written by others will prevent an action of false attribution from succeeding); *Landon v. Twentieth Century-Fox Film Corp.*, 384 F. Supp. 450 (S.D.N.Y. 1968).

⁶¹ Defamation claims have generally been raised in cases where the work falsely attributed to the author is of inferior quality to the original work, and as such damages his reputation. See *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929); *Gershwin v. Ethical Publishing Co.*, 166 Misc. 39, 1 N.Y.S.2d 904 (S. Ct. N.Y. County 1937); *American Law Book Co. v. Chamberlayne*, 165 F. 313 (2d Cir. 1908).

⁶² *Follett v. Arbor House Publishing Co.*, 208 U.S.P.Q. 597 (S.D.N.Y. 1980); *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942); *Giesecking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (S. Ct. N.Y. County 1956); *Williams v. Weissner Publishing Co.*, 78 Cal. Rptr. 542 (1969) (truthful attribution of the author's name on an unauthorised publication of a previously unpublished work – on the basis that the original author did not consider the work worthy of publication – was held to violate the author's right of privacy as it suggested to the public the author's approval of publication of his work); *Zim v. Western Publishing Co.*, 573 F.2d 1318 (5th Cir. 1978) (use of the author's name on a revised version of a previously published work, where the publication of the revision was not authorised by the author, was held to violate the author's right of privacy).

⁶³ False attribution has been held to constitute a false description or representation and thus violate section 43(a) of the Lanham Act. See *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976); *Jaeger v. American Int'l Pictures, Inc.*, 330 F. Supp. 274 (S.D.N.Y. 1971) (common law unfair competition and Lanham Act both suggested as possible causes of action); *Benson v. Paul Winley Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978) (publication of a work created by the author in the past and misrepresented as being the author's contemporary work was held to violate section 43(a) of the Lanham Act); *Rich v. RCA Corp.*, 390 F. Supp. 530 (S.D.N.Y. 1975) (use of a current photograph of an author in connection with an old text was held to violate section 43(a) of the Lanham Act). Note: According to Nimmer, "this construction can survive *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), to the extent that it arises under the false advertising paragraph of Section 43(a) of the Lanham Act, rather than under its catch-all protection statements as to "origin". See, Nimmer, M.B., Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-), at para. 8D.03[B][3].

substantially altered without his consent and he is credited as the creator of the new work, he can claim violation of his false attribution right⁶⁴. If, on the other hand, the new work carries a notice which truthfully indicates that the work is based upon or derived from the author's work, thus not representing that it is created or authorised by the author, a false attribution claim is unlikely to succeed⁶⁵.

On the facts of *The Secret Diaries* case⁶⁶, A will claim that her right of false attribution has been infringed by the publication of the diary entries by B. It is not clear how US courts would decide this case. C did not make use of A's work but wrote some fictional diary entries, which at first sight might have led the average reader to assume that they had been authored by A. In addition, it is not clear whether B can rely on any defences under general principles of law. However, B could invoke his right of freedom of expression under the First Amendment as a defence to the publication of the diary entries. US courts have, on a number of occasions, examined the application of free speech arguments in the context of an author's attribution right infringement claims under general principles of law⁶⁷.

The case of *Rogers v. Grimaldi*⁶⁸, involved a movie by Federico Fellini entitled "Ginger and Fred". The characters, albeit fictitious, were two Italian cabaret performers who made a living by imitating Fred Astaire and Ginger Rogers. Rogers brought an action against the distributors and producers of the movie for violation of section 43(a) of the Lanham Act and infringement of her common law rights of publicity and privacy. The Second Circuit dismissed the claim. Given the fact that there was some artistic relevance between the title and content of the movie, First Amendment interests were held to prevail, despite the limited potential of consumer confusion. The court ruled that "most consumers

⁶⁴ *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968).

⁶⁵ *Hospital For Sick Children v. Melody Fare Dinner Theatre*, 516 F. Supp. 67 (E.D. Va. 1980) ("The use of words such as 'based on' or 'derived from' may be sufficient to negate any false designation or description that may otherwise be present"); *King v. Innovation Books, Div. of Innovative Corp.*, 976 F.2d 824 (2d Cir. 1992), at 829 (A motion picture derived from Stephen King's "The Lawnmower Man" should not be advertised as "Stephen King's The Lawnmower Man" as that would be a false statement; however, giving King a "based upon" credit would not violate King's attribution right).

⁶⁶ For the facts of the case, see para. 3.2.

⁶⁷ Some of the cases discussed below involve trade mark law infringement. They are however considered important because of the courts rulings on the application of free speech.

⁶⁸ 875 F.2d 994 (2d Cir. 1989).

are well aware that they cannot judge a book solely by its title any more than by its cover⁶⁹” and stated that “We believe that in general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression⁷⁰”. In affect, the court ruled that the Lanham Act has to be construed narrowly when applied to titles because of First Amendment concerns⁷¹. However, the court went on to state that an explicitly misleading title such as “The True Life Story of Ginger and Fred” would not escape court sanction⁷².

Following this precedent, later cases have appeared to uphold the importance of First Amendment arguments. In the case of *Mattel, Inc. v. MCA Records, Inc.*⁷³, at issue was the song by Dutch band Aqua entitled “Barbie Girl” and its suggestive lyrics, which included provocative dialogues between Barbie and Ken. Mattel, the maker of the Barbie doll, filed suit on several grounds, with the primary claims being trademark infringement and dilution. The district court granted MCA’s motion for summary judgment and rejected Mattel’s argument that its property interests were being harmed by the association of the Barbie doll with unsavoury song lyrics. The Ninth Circuit upheld the decision and ruled that the song’s parody was protected speech “inextricably entwined” with its commercial purpose. In order to delineate the boundary between commercial and non-commercial speech, the court went on to discuss the case of *Hoffman v. Capital Cities/ABC, Inc.*⁷⁴ where the Ninth Circuit had stated that “the core notion of commercial speech” is that “it does no more than propose a commercial transaction”⁷⁵. On the basis of this analysis, the court held that “if speech is not ‘purely commercial’ – that is, if it does more than propose a commercial transaction – then, it is entitled to full First Amendment protection” and that First Amendment protection outweighed Mattel’s trade mark interest⁷⁶:

⁶⁹ 875 F. 2d 994 (2d Cir. 1989), at 1000.

⁷⁰ 875 F. 2d 994 (2d Cir. 1989), at 998-99.

⁷¹ It should be noted that the argument that *Rogers v. Grimaldi* only applies to works of parody has been rejected. See *Simon & Shuster Inc. v. Dove Audio Inc.*, 970 F. Supp. 279 (S.D.N.Y. 1997).

⁷² 936 F. Supp. 156 (S.D.N.Y. 1996), at 1000. “To illustrate, some titles – such as ‘Nimmer on Copyright’ and ‘Jane Fonda’s Workout Book’ explicitly state the author of the work or at least the name of the person the publisher is entitled to associate with the preparation of the work”. *Id* at 999.

⁷³ 296 F.3d 894 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003).

⁷⁴ 255 F.3d 1180 (9th Cir. 2001).

⁷⁵ 255 F.3d 1180 (9th Cir. 2001), at 1184.

⁷⁶ Following the Second Circuit’s judgment in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

“Applying *Rogers* to our case, we conclude that MCA’s use of Barbie is not an infringement of Mattel’s trademark. Under the first prong of *Rogers*, the use of Barbie in the song title clearly is relevant to the underlying work, namely the song itself. As noted, the song is about Barbie and the values Aqua claims she represents. The song title does not explicitly mislead as to the source of the work; it does not, explicitly or otherwise, suggest that it was produced by Mattel⁷⁷”. Likewise, the panel upheld the district court’s dismissal of Mattel’s defamation claim.

Similarly, in 1996, the court allowed a motion picture docudrama about the Black Panther Party to use “the name and likeness” of party founder Bobby Seale⁷⁸, while, in 2002, in the case of *Comins v. Discovery Comms., Inc.*⁷⁹ the court once again delineated the boundaries of trademark law⁸⁰.

However, in the case of *Parks v. LaFace Records*⁸¹, the Sixth Circuit ruled against the defendants First Amendment claims. The case involved a dispute over the name of a rap song with an “explicit content” entitled “Rosa Parks”⁸² Rosa Parks, a prominent figure in the US civil rights movement, sued the defendants for defamation, interference with business relationships and for violating her publicity rights under the Lanham Act and Ohio state law. The district court granted the defendants motion for summary judgment and held that their song was expression protected under the First Amendment. However, the Sixth Circuit reversed the district court’s decision on the basis that use of Rosa Park’s name in the title was purportedly not “artistically related to the content of the song”.

In *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*⁸³, the Second Circuit held that “in deciding the reach of the Lanham Act in any case where an expressive work is alleged to infringe a trademark, it is appropriate to weigh the public interest in free expression against the public interest in avoiding

⁷⁷ 875 F. 2d 994 (2d Cir. 1989), at 902.

⁷⁸ *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996), at 339-40.

⁷⁹ 200 F. Supp. 2d 512 (D. Md. 2002), at 522.

⁸⁰ “However ungracious it may seem for Defendants to have included Comins in its ‘thank you’ list after deciding not to produce a film based on the Book, the Lanham Act should not be used as a remedy for a bruised ego”. (200 F. Supp. 2d 512 (D. Md. 2002), at 522). See also *Playboy Enterprises, Inc. v. Welles*, 7 F. Supp. 2d 1098 (S.D. Cal. 1998).

⁸¹ 329 F.3d 437, 442, 456 (6th Cir.), *cert. denied*, 124 S. Ct. 925 (2003).

⁸² The song featured the lyric “Everybody move to the back of the bus...”.

⁸³ 886 F.2d 490 (2d Cir. 1989).

consumer confusion”⁸⁴. The courts line of reasoning appeared to be similar in the defamation case of *Hustler Magazine v. Falwell*⁸⁵, whereby it was ruled that “The mere fact that a person’s/celebrity’s name is attached to something offensive is not enough to overcome a defendant’s First Amendment rights”⁸⁶.

On the facts of *The Secret Diaries* case, it is not clear whether the court would consider the *Rogers* test of artistic relevance in order to determine whether B’s publication of the diary entries has violated A’s publicity rights under the Lanham Act. The court might examine the series artistic relevance to A’s underlying work – i.e. her collection of selected diary entries – and whether they explicitly mislead the public as to the source and content of the series. In turn, B will counter claim that the publication of the series falls within the ambit of his right of free speech, and that therefore does not violate section 43(a) of the Lanham Act. On this basis, the court is likely to balance B’s First Amendment claim against the plaintiff’s interests. Following the line of reasoning of existing case law, it is difficult to predict whether the court would hold that free speech would predominate A’s moral right. However, the existing body of case law in this context, could suggest that the First Amendment has often been the victor in a tug of war between free speech and intellectual property interests. Perhaps, the concluding remarks of Judge Alex Kozinski in the case of *Mattel, Inc. v. MCA Records, Inc.*⁸⁷, even though somewhat exaggerated, sum up the American stance to a rather limited attribution right protection until recently:

“All of these [words] are variants of the invective most often hurled at accused infringers, namely ‘piracy’. No one hearing this accusation understands intellectual property owners to be saying that infringers are nautical cutthroats with eye-patches and peg legs who board galleons to plunder cargo. In context, all these terms are non-actionable ‘rhetorical hyperbole’.... The parties are advised to chill”.

⁸⁴ 886 F. 2d 490 (2d Cir. 1989), at 494.

⁸⁵ 485 U.S. 46 (1988). The case applied the public figure defamation test to deny a celebrity the intentional infliction of emotional distress claim against the defendant’s magazine for its depiction of him engaging in incest and alcohol abuse.

⁸⁶ 485 U.S. 46 (1988), at 57.

⁸⁷ 296 F.3d 894 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003).

However, the court's approach appears to have changed since 2003 with the passing of the judgement in *Dastar Corp. v. Twentieth Century Fox Film Corp.*⁸⁸. The case has arguably put an end to most causes of action for false and misleading attributions of artistic works⁸⁹.

This section would conclude that, in the United States of America, until the decision in *Dastar*, under general principles of law, and the Lanham Act in particular, courts were likely to take into account a defendant's claims to free speech protection and carry out a balancing exercise. Such an exercise did not appear to have been established on the basis of any identifiable rules of thumb and it was thus likely that courts would hand down the rulings on a case-by-case basis. However, since *Dastar* the protection of moral rights under section 43(a) of the Lanham Act appears to be weak. The difficulty of establishing infringement of the author's right of false attribution renders any potential conflicts with free speech of less relevance. Consequently, one could even go as far as to argue that potential conflicts between the two rights are hard to arise, at least under the Lanham Act, given that their availability to him under the Act is under question. On the facts of *The Secret Diaries* case, if one assumes that the *Dastar* decision applies equally to literary works, A might not be allowed to claim infringement of her moral right of false attribution. Any potential conflict with B's right of free speech would thus not materialise.

ii VISUAL ARTISTS RIGHTS ACT 1990

In considering situations of potential conflict between the author's attribution right and another party's right of freedom of expression, this section considers the attribution right, within the context of VARA 1990, as encompassing:

- i. The right of the author to claim authorship⁹⁰, which includes the right to publish anonymously or pseudonymously⁹¹,
- ii. The right to prevent use of his right as the author of the work that he did not create⁹², and

⁸⁸ 539 U.S. 23 (2003). The case is further discussed in para. 3.5.3.2(i).

⁸⁹ For a critical analysis of *Dastar*, see Landau, M., "*Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*" (2005) 61 N.Y.U. Annual Survey of American Law 273.

⁹⁰ Copyright Act 1976, section 106A(a)(1)(A).

⁹¹ United States House of Representatives Report No. 101-514, 101st Congress, Second Session 15 (1990), quoting *Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 Colum.-VLA J. L. & Arts 550 (1986).

- iii. The right to prevent use of his name as the author of a work of visual art that, although he might have created, has been subjected to “a distortion, mutilation, or other modification ... which would be prejudicial to ... [his] honor or reputation”⁹³. In order to establish that an act is “prejudicial” to the author’s honour or reputation, the “modification of a work of recognized stature [must] generally establish harm to honor or reputation”⁹⁴, while “the best approach to construing the term ‘honor or reputation’ ... is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected”⁹⁵.

VARA provides for a number of exceptions to the artist’s attribution right. The right “shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of ‘work of visual art’”⁹⁶. The reference to subparagraph (A) is reference to the exclusion of among other items, any poster, map, globe, chart, motion picture, book, magazine, data base, electronic publication, merchandising item, packaging material etc⁹⁷. In other words, a depiction of a protected work of visual art upon any of the afore-mentioned items need not be accompanied by the artist’s name. Reference to subparagraph (B) is reference to the exclusion of “works made for hire”⁹⁸. As such, any reproduction upon or in any connection with any work for hire need not be accompanied by the artist’s name.

Thus, the attribution right under VARA merely covers original tangible art objects (artefacts) as opposed to intangible intellectual creations⁹⁹. In addition, it appears that case law under VARA is sparse¹⁰⁰. For the purposes of the present analysis, given the limited application of the Act and lack of relevant case law, it

⁹² Copyright Act 1976, section 106A(a)(1)(B).

⁹³ Copyright Act 1976, section 106A(a)(2).

⁹⁴ United States House of Representatives Report No. 101-514, 101st Congress, Second Session 15 (1990).

⁹⁵ United States House of Representatives Report No. 101-514, 101st Congress, Second Session 15 (1990), at 15.

⁹⁶ Section 106A(c)(3).

⁹⁷ See US Copyright Act 1976, section 101.

⁹⁸ For the definition of a “work made for hire”, see US Copyright Act 1976, section 101.

⁹⁹ For an analysis of the author’s moral rights under VARA, see Karlen, P.H., “What’s Wrong With VARA: A Critique of Federal Moral Rights” (1993) 15 Hastings Comm. & Ent. L.J. 905; Ciolino, D.S., “Rethinking the Compatibility of Moral Rights and Fair Use” (1997) 54 Wash. & Lee L. Rev. 33.

¹⁰⁰ The majority of the reported cases under VARA involve alleged violations of the artist’s integrity right. See para. 3.5.3.2(ii).

is difficult to envisage situations where free speech would come into play within this context.

3.5.3.2 INTEGRITY RIGHT AND FREEDOM OF EXPRESSION

i GENERAL PRINCIPLES

In examining situations of potential conflict between the author's integrity right and another party's right of free speech in the context of general principles, this section considers the integrity right as encompassing:

- i. The right of the author to prevent distortion, truncation or mutilation of his work, and
- ii. The right of the author, under certain circumstances, to object to the destruction of his work.

The right of the author to prevent distortion or truncation of his work has been recognised in a number of early cases¹⁰¹, but was clearly established in the landmark case of *Gilliam v. American Broadcasting Companies*¹⁰². The Second Circuit held that unauthorized changes in a work that are so substantial as to impair the integrity of the original work shall constitute copyright infringement; in this case, substantial alteration was held to be the omission of twenty-four minutes from the original ninety- minutes long recording of the plaintiffs "Monty Python" television show¹⁰³. Nimmer has interpreted the Gilliam decision, on a contract law respect, to mean that "A grant of certain rights, such as reproduction and/or performance, does not in itself constitute a grant of any other rights conferred upon the author, such as the adaptation right. Material changes to a work would infringe this right, even if the person making such changes were an unconditional grantee of the reproduction and/or performance rights"¹⁰⁴.

¹⁰¹ *Harms, Inc. v. Tops Music Enters., Inc.*, 160 F. Supp. 77 (S.D. Cal. 1958); *Autry v. Republic Prods., Inc.*, 213 F.2d 667 (9th Cir.), cert. denied, 348 U.S. 858 (1954); *Rice v. American Program Bureau*, 446 F.2d 685 (2d Cir. 1971); *Robert Stigwood Group, Ltd. v. Speber*, 332 F. Supp. 1206 (S.D.N.Y. 1971), modified, 457 F.2d 50 (2d Cir. 1972).

¹⁰² 538 F.2d 14 (2d Cir. 1976).

¹⁰³ For a more detailed discussion of the facts of the case, see para. 1.3.2.3 (Moral Rights under US law – Protection under general principles).

¹⁰⁴ Nimmer, M.B. and Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-) at para. 8D.04[A][1].

Violation of the author's integrity right has been held to include the speeding up of the movement in a video game¹⁰⁵, the insertion of a defendant's advertising into an otherwise authorized reproduction of the plaintiff's work¹⁰⁶ and a defendant's marketing of a tape to be used in the plaintiff's "Teddy Ruxpin" toy bear (damaging the commercial value of the plaintiff's work)¹⁰⁷.

On the other hand, cases have held that presenting a work in a manner consistent with the licensee's style shall not constitute infringement¹⁰⁸. Thus, a magazine's minor cropping of a photograph¹⁰⁹ and the reproduction of an excerpt of a letter-to-the-editor (despite its submission under the express condition that it can only be reproduced in its entirety)¹¹⁰ have been held to constitute fair use, thus not infringing the author's right of integrity.

The *Gilliam* case recognised a second interpretation to the author's integrity right, separate from that rooted in principles of copyright infringement¹¹¹. Under this right, the cause of action is based on mutilation of the author's work and has been termed as "the right of the artist to have his work attributed to him in the form in which he created it"¹¹². In effect, this right combines the integrity right with the attribution right. Consequently, in this context, violation of the author's integrity violation could entail a violation of his attribution right as well. At the heart of *Gilliam's* ruling on this right is that "ABC impaired the integrity of the appellants' work and represented to the public as the product of the appellants what was actually a mere caricature of their talents"¹¹³.

At present however, the strength of the *Gilliam* case as supporting claims of moral rights under the Lanham Act is under discussion¹¹⁴ as a result of the

¹⁰⁵ *Midway Manufacturing Co. v. Artic International, Inc.*, 704 F.2d 1009 (7th Cir.), cert. denied, 464 U.S. 823 (1983).

¹⁰⁶ *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980).

¹⁰⁷ *Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc.*, 658 F. Supp. 351 (N.D. Tex. 1986).

¹⁰⁸ This approach appears to be consistent with the ruling in the *Gilliam* case.

¹⁰⁹ *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000).

¹¹⁰ *Diamond v. Am-Law Corp.*, 745 F.2d 142 (2d Cir. 1984).

¹¹¹ The case is extensively discussed in para. 1.3.2.3.

¹¹² 538 F.2d 14 (2d Cir. 1976), at 24. See, also *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988) (*dictum*), *aff'd*, 490 U.S. 730 (1989).

¹¹³ 538 F.2d 14 (2d Cir. 1976), at 25.

¹¹⁴ For a detailed discussion on this issue, see Nimmer, M.B., Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-) at para. 8D.04[A][2]. Also, see Suhl, N.C., "Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?" (2002) 12 Fordham Intell. Prop. Media & Ent. L. J. 1203 at 1224 ("The *Gilliam* holding is

decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*¹¹⁵, which seems to limit significantly the availability of moral rights claims under such general principles of law¹¹⁶. “When Congress has wished to create such an addition to the law of copyright, it has done so with much more specifically than the Lanham Act’s ambiguous use of ‘origin’. The Visual Artists Rights Act of 1990 provides that the author of an artistic work ‘shall have the right ... to claim authorship of that work’. That express right of attribution is carefully limited and focused: It attaches only to specified ‘works of visual art’, is personal to the artist, and endures only for ‘the life of the author’. Recognizing in § 43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous¹¹⁷”.

It is not clear how *The Paris Novel* case¹¹⁸ would be decided by a US court at present. Its facts¹¹⁹ are dissimilar to both the *Dastar* and *Gilliam* cases as infringement of the author’s integrity right is centred on injury to his honour or reputation through parody rather than through some form of mutilation of his work. However, the line of reasoning of existing case law can be used in order to determine the way in which the courts would decide this case under general principles of law.

If the case were to be decided under *Dastar*, it would appear that the court would be reluctant to uphold infringement of D’s integrity right outside the scope of VARA. The Supreme Court ruled that the limited right of attribution created by VARA “negates a construction whereby section 43(a) of the Lanham Act creates an open-ended attribution right¹²⁰”. Consequently, it would seem unlikely that E’s right of free speech would be stifled.

problematic as precedent because the facts are so unique and represent a clear case of mutilation; therefore, many courts who are not inclined to protect the right to integrity will distinguish the facts of *Gilliam*.”).

¹¹⁵ 539 U.S. 23 (2003).

¹¹⁶ For a detailed discussion of the *Dastar* case, see paras. 1.3.2.3 and 2.5.3.1(i).

¹¹⁷ 539 U.S. 23 (2003), at 34-35.

¹¹⁸ For the facts of the case, see para. 3.2.

¹¹⁹ The facts of *The Paris Novel* case raise issues such as the legal importance parody. This issue is examined in para. 4.5.3.1.

¹²⁰ 539 U.S. 23 (2003), at 34-35.

On the other hand, if the case were to be decided under *Gilliam*¹²¹, the court could uphold a violation of D's integrity right under the Lanham Act. On this basis, E would invoke his free speech right under the First Amendment. The free speech doctrine does not appear to have been invoked to date in cases involving violation of the author's integrity right under general principles of law. However, it could be argued that if it were invoked, the courts approach would be similar to that in cases involving alleged violations of the author's moral right of attribution under general principles of law¹²². On this basis, US courts would take into account First Amendment concerns. As such, it would appear unlikely that E's free speech right would be in any way stifled.

Overall, it would appear that the seemingly limited scope of the integrity right coupled with evidence that US courts value First Amendment concerns, do alleviate conflicts between the rights, however only to an extent. Cases are assessed on their individual facts and there seems to be no general rule established regarding First Amendment claims vis-à-vis the author's integrity right.

ii VISUAL ARTISTS RIGHTS ACT 1990

Section 106A of the US Copyright Act confers upon the authors of works of visual art the right to "prevent any intentional distortion, mutilation, or other modification of that work that would be prejudicial to his or her honor or reputation"¹²³. Furthermore, the artist "has the right to prevent any destruction of a work of 'recognized stature'¹²⁴ and any intentional or grossly negligent destruction of that right is violation of that right"¹²⁵. It is thus notable that although an intentional and

¹²¹ That would only occur if the *Gilliam* ruling survives *Dastar*. As discussed above, the strength of the *Gilliam* case as supporting claims of moral rights under the Lanham Act is under discussion. See *Choe v. Fordham University School of Law*, 920 F. Supp. 44 (S.D.N.Y. 1995); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210 (11th Cir. 2000); *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000).

¹²² For an analysis of such cases and the courts approach, see para. 2.5.3.1(i).

¹²³ Copyright Act 1976, section 106A(a)(3)(A).

¹²⁴ The court in *Carter v. Hemsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994), later opinion, 861 F. Supp. 303 (S.D.N.Y. 1994), established a two-tier test for works of "recognized stature" requiring the artist to show that: (a). the visual art in question has stature, and is viewed as meritorious, and (b). the stature is recognised by art experts, other members of the artistic community, or by some cross-section of society. In *Martin v. City of Indianapolis* 982 F. Supp. 625 (S.D.Ind. 1997), the court, following *Carter*, held that a stainless steel sculpture had "recognized stature" when it had won "best of show" in an annual art show, an art critic described it as a fine piece of sculpture and an art gallery director described it as interesting and aesthetically stimulating.

¹²⁵ Copyright Act 1976, section 106A(a)(3)(B).

prejudicial mutilation is an integrity right violation¹²⁶, with respect to destruction, the act must be intentional or grossly negligent in order for it to amount to an integrity right violation¹²⁷.

Section 106A provides for a number of exceptions to the integrity right. Firstly, the modification of a work of visual art which results from "the passage of time or the inherent nature of the materials"¹²⁸ shall not constitute a distortion, mutilation or other modification¹²⁹. This exception however, does not extend to works of recognized stature¹³⁰. Secondly, the modification of a work of visual art that results from "conservation, or the public presentation including lighting and placement of a work"¹³¹ shall not constitute destruction, distortion, mutilation or other modification¹³². This exception however does not apply in cases where the modification is caused by gross negligence¹³³. Thirdly, the last exception is coterminous with the exception to the attribution right¹³⁴. In the same way as a poster, map, or database is exempt from the artist's attribution right, such uses are also exempt from liability as violations of the artist's integrity right.

The first published case to consider any of the rights afforded under VARA did not arise until 1994¹³⁵. The case related to the exception for artworks incorporated into buildings. Three artists brought an action to prevent the removal, alteration and destruction of art work commissioned by a property developer for installation in a lobby of a commercial building. The art work consisted of interrelated sculptural elements made of recycled materials and installed on walls, the ceiling and in a floor mosaic. The owners of the building wanted to remove the work, but the removal could not be carried out without causing alteration or destruction of some elements. On appeal, the Second Circuit reversed the district court's decision and found for the defendants on different grounds, holding that the subject building installation was ineligible for protection, being a work for hire. This decision coupled with the fact that only a

¹²⁶ Copyright Act 1976, section 106A(a)(3)(A).

¹²⁷ Copyright Act 1976, section 106A(a)(3)(B).

¹²⁸ Copyright Act 1976, section 106A(c)(1).

¹²⁹ Copyright Act 1976, section 106A(a)(3)(A).

¹³⁰ Copyright Act 1976, section 106A(a)(3)(B).

¹³¹ Copyright Act 1976, section 106A(c)(2).

¹³² Copyright Act 1976, section 106A(a)(3).

¹³³ Copyright Act 1976, section 106A(c)(2).

¹³⁴ Copyright Act 1976, section 106A(c)(3). For a more detailed discussion of the exception, see para. 3.5.3.1(ii).

¹³⁵ *Carter v. Hemsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994), *later opinion*, 861 F. Supp. 303 (S.D.N.Y. 1994).

limited number of cases have been brought under VARA since its enactment, means that “few precedential decisions have defined the contours of the Visual Artists Rights Act 1990”¹³⁶.

Thus, the author's integrity right under VARA is limited in nature as it is applicable in cases of work of visual art. In addition, the number of judgments delivered under VARA is limited and reported judgments¹³⁷ do not cover situations of actual or potential conflict between the right of integrity and free speech. For the purposes of the present analysis, it is difficult to envisage situations where free speech interests would come into play within this context.

3.5.4 FRANCE

3.5.4.1 PATERNITY RIGHT AND FREEDOM OF EXPRESSION

Article L.121-1 of the French Intellectual Property Code provides for the author's paternity right, which covers both his right to be identified as the author of a work¹³⁸ and the false attribution right. The statutory provision appears to be worded in general terms. It does not specifically set out what would constitute an infringing act neither does it specify any exceptions or defences to the rights.

Case law on the false attribution right appears to be limited. In 1957, the Cour de Paris upheld infringement of the author's moral right where the works of an artist were included in a book exhibition and the way they were exhibited had falsely led people attending the exhibition to believe that someone else was the artist of the works¹³⁹. Similarly, in 1961, the Cour de Cassation held that creating

¹³⁶ Nimmer, M.B., Nimmer, D., *Copyright* (Mathew Bender, looseleaf, 1963-) at para. 8D.06[D].

¹³⁷ See *Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D.Ind. 1997) (The court found that the City of Indianapolis violated a sculptor's moral rights by demolishing a sculpture installed on municipality-acquired land.); *Pavia v. 1129 Avenue of the Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995) (A sculptor filed an action against the owner of one of his sculptures for the altered display of his work, alleging that the improper display of his work damaged his honor and reputation); *English v. BFC & R East 11th Street LLC*, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. 1997), *aff'd*, 198 F.3d 233 (2d Cir. 1999) (The court held that VARA is inapplicable to art work that is placed on the property of others without their consent when such art work cannot be removed from the site in question.).

¹³⁸ This aspect of the author's paternity right and relevant case law is not examined hereby as it is submitted that freedom of expression cannot and should not be employed as a defence to the omission by a party to attribute a work to its author. For a discussion of French cases involving altered reproductions of original works, see Ginsburg, J.C., “Art and the Law: Suppression and Liberty” (2001) 19 *Cardozo Arts & Ent. L.J.* 9; Merryman, J.H., “The Refrigerator of Bernard Buffet” (1976) 27 *Hastings L.J.* 1023.

¹³⁹ Decision of Cour De Paris, October 29, 1957: (1959) *Ann.* 205. The Tribunal de Grande Instance later held that violation of the author's paternity right shall be infringed

a false impression that a work has been created by someone other than the author would constitute a violation of the author's moral right¹⁴⁰.

On the facts of *The Paris Novel* case¹⁴¹, A will bring an action against B for infringement of his moral right. French law appears to suggest that so long as the courts are satisfied that the public has been misled as to the identity of the work's author it will rule that a violation of Article L.121-1 has taken place. Although the newspaper article that B published did acknowledge the journalist as being its author, the fact that it was headed 'A's Secret Diaries' and prominently featured A's picture could lead the average reader to believe that the author was A. The fact that the article could create such an impression would seem to suffice for a French court to find infringement.

If one assumes that the court holds that a moral right infringement has occurred, it appears that B will have no grounds of defence. The French Intellectual Property Code does not make provision for any specific limitations or exceptions to the author's paternity right¹⁴².

Alternatively B could rely on the right of freedom of expression as a defence. Case law involving the application of the author's paternity right vis-à-vis another party's freedom of expression right appears to be sparse. It is therefore difficult to predict how a French court would assess such an argument at this stage of the development of the jurisprudence¹⁴³. However, it is evident that there can be situations of conflict between the two rights, as this discussion has illustrated.

not only by failure to mention his name in connection with his works but also by falsely crediting them to another person. See Decision of Tribunal Grande Instance de Paris, March 31, 1969: (1970) RTDC 395 (No.1). For a more detailed analysis of these cases, see Price, M.E., "Resuscitating a Collaboration with Melville Nimmer: Moral Rights and Beyond," (1998) *Occasional Papers in Intellectual Property*, Benjamin N. Cardozo School of Law Yeshiva University, No. 3.

¹⁴⁰ Decision of Cour de Cassation, January 31, 1961: (1961) *Dalloz* 81. On the facts of the case, the defendant used three of the plaintiff's book covers (the plaintiff being a book cover maker) in a book exhibit and placed his own business cards next to the covers, thus creating the impression that he was the maker of the covers.

¹⁴¹ The facts of this hypothetical case are set out in para. 3.2.

¹⁴² In addition, the pastiche and parody defence under article L.122-5(4) cannot be invoked as it is not relevant on the facts of this case.

¹⁴³ See further paras. 3.5.4.2 (examination of the author's integrity right vis-à-vis freedom of expression) and 4.5.4.1 (examination of the author's reproduction right vis-à-vis freedom of expression) which appear to support this conclusion.

3.5.4.2 INTEGRITY RIGHT AND FREEDOM OF EXPRESSION

It appears that the scope of the author's integrity right¹⁴⁴ under the French Intellectual Property Code and the way in which it has been interpreted by the courts is broad. One of the aspects of the right that is different both from equivalent provisions in other jurisdictions and Article 6*bis* of the Berne Convention is that, as a general rule, the courts determine infringement of the integrity right to a large extent by looking at the opinion of the author himself about whether his work has received derogatory treatment¹⁴⁵.

The integrity right's broader scope appears to be supported by French case law. It is interesting to draw a comparison between a French¹⁴⁶ and a UK case¹⁴⁷ with similar facts that have been decided differently by the respective courts. Both cases involved the reproduction of original works with altered and added colours. While the UK court did not find infringement of the author's integrity right, the French court did.

Nevertheless, the seemingly wide scope of the author's right of integrity is limited through the provision of an equally wide exception. When a work has been made public, the author cannot forbid "parody, pastiche and caricature, taking account of the laws of the genre"¹⁴⁸.

On the facts of *The Paris Novel* case¹⁴⁹, D will claim that his integrity right in the work has been infringed. Since the author does not have the burden of proving prejudice to his honour or reputation, it can be argued that it is likely that A will be able to establish that his novel has received derogatory treatment and that the court, accepting D's assessment, will rule that there has been infringement of his right under article L.121-1 of the French Intellectual Property Code.

¹⁴⁴ French Intellectual Property Code 1992, article L. 121-1. For a detailed discussion of the author's integrity right under French law, see para. 1.3.2.3.

¹⁴⁵ "Godot", TGI Paris, October 15, 1992, (1993) 155 R.I.D.A. 225; *Schoendoerffer v. Mod Films*, TGI Paris, March 23, 1994, (1995) 164 R.I.D.A. 401; *Duchêne v. David Lachapelle Studios et al.*, TGI Paris, 3e ch., May 10, 2002, (2002) 194 R.I.D.A. 332.

¹⁴⁶ *Deveria v. "l'Express"* CA Paris, October 31, 1988; *Cahiers du Droit d'Auteur*, April 22, 1989 (reproduction of a portrait of Liszt with added colours in a newspaper).

¹⁴⁷ *Tidy v. Trustees of the Natural History Museum* [1996] EIPR 86; (1995) 39 IPR 501 (reproduction of cartoon drawings with altered colours and in reduced size).

¹⁴⁸ Intellectual Property Code 1992, article L.122-5(4).

¹⁴⁹ For an analysis of the facts of this hypothetical case, see para. 3.2.

E, on the other hand, will rely on the parody exception. Firstly, E will have to establish that, in writing his novel, he had not motivated by malice against D¹⁵⁰. Even though E is free to rely on this defence, he must take account of “the laws of the genre”¹⁵¹. For the defence to succeed, E will have to establish two elements – the “connection” element and the “purpose” element¹⁵². It is arguable that he will be able to prove the connection element; the general public will recognise his reference to D’s work and also that the two works are separate. It is debatable whether the court will accept the existence of the purpose element. E’s novel does not produce comic or even satirical effects as such, and even though his comments are not purposefully malicious, they can potentially injure D’s honour or reputation. In the case of *Sté Marc Dorcel v. Sté Edgar Rice Burroughs*¹⁵³, the defendant produced a film based on a novel using characters and scenes from the novel in pornographic episodes. The Court held that this was incompatible with the qualities of humour and derision of the parody exception which, consequently, could not be claimed. The present case does not involve issues like pornography. It is arguable that on the present facts, the parody defence might be allowed.

Alternatively, E could invoke his right of freedom of expression as a defence to D’s infringement claim. There appears to be no French case ruling or commentary on the relationship between the integrity right and freedom of expression. Although courts have had to balance freedom of expression against other rights, often constitutional in nature, there does not appear to be a decided case to date where the right has been juxtaposed against an author’s moral rights¹⁵⁴. Thus, it is difficult to predict how the courts would react if E were to raise a freedom of expression defence.

Overall, at this stage of the development of the jurisprudence, it appears difficult to assess with certainty the stance of French courts towards a case involving the competing interests of the integrity right and freedom of expression. On the one

¹⁵⁰ If that was the case, the parody defence would not be available. See *Dechavanne*, CA Douai, December 23, 1992, comment by Logie in [1993] 4 Ent. L. Rev. 121.

¹⁵¹ Intellectual Property Code, article L.122-5(4).

¹⁵² For an extensive discussion of these elements, see Sterling at pp.522-23.

¹⁵³ Versailles Court of Appeal, November 6, 1998: (1999) 181 R.I.D.A. 314.

¹⁵⁴ Cases where French courts have had to balance freedom of expression against other constitutional rights are discussed in para. 1.3.2.3. Also, see a discussion of the relationship between an author’s economic right of reproduction and freedom of expression in para. 4.5.4.1.

hand, case law on the matter seems to be sparse, the author's integrity right can be broad in nature while the French judiciary attaches considerable weight to the author's "personality rights". On the other hand, the courts have to be satisfied with the author's assessment that his work has been "denatured", and a party's right of freedom of expression can potentially be acknowledged and addressed through the availability of the relatively broad parody, pastiche and caricature defence. Freedom of expression could potentially be accommodated through the parody defence, however the scope of the defence is limited to specific cases and does not cover derivative works that do not fall under the parody or pastiche classification.

3.5.5 GERMANY

3.5.5.1 PATERNITY RIGHT AND FREEDOM OF EXPRESSION

The author's paternity right is recognised in article 13 of the 1965 Law and does encompass not only the author's positive right of claiming authorship of his work but also the negative right of taking action against others for usurping it¹⁵⁵. It appears that this negative aspect of the right has not been frequently invoked since case law on the subject is sparse. This also appears to be the case where the right of false attribution and the right of freedom of expression may be invoked. Thus, case law appears to be once again sparse.

If one were to decide how a German court would rule on the facts *The Secret Diaries* case¹⁵⁶, one would probably have to reach a conclusion based on the general approach of German jurisprudence to the issue of potential conflicts between copyright and freedom of expression as within the context of the author's "false attribution" there seems to be no case law or legal commentary that could provide some guidance. Consequently, it is difficult to determine the scope and nature of the author's moral right and thus how much this could limit another party's freedom of expression. There appears to be no decided case to date with facts similar to this hypothetical case and thus, it is difficult to draw conclusions regarding the interaction of the rights.

¹⁵⁵ See Dietz, A., "Germany" in *International Copyright Law and Practice* (1988) (Geller, P.E. and Nimmer, M.B., Matthew Bender, 1988) (and annual updates, 1989-2005), at §7.

¹⁵⁶ The facts of the case are set out in para. 3.2.

Overall, German courts have illustrated that, at times, they will take freedom of expression into account. However, the lack of judicial consistency and relevant legal rules it would be unsound to draw a conclusion at this stage of the development of the jurisprudence as to whether the moral right predominates freedom of expression.

3.5.5.2 INTEGRITY RIGHT AND FREEDOM OF EXPRESSION

Article 14 of the Author's Right and Related Protection Rights Law 1965 is worded in a similar manner to Article 6*bis* of the Berne Convention and the test for assessing infringement of the right is objective¹⁵⁷.

Case law appears to suggest that the author's moral right of integrity will be held to have been infringed where the author's honour or reputation has been prejudiced. Examples of such infringement include placing songs in a compilation of recordings with a distinct neo-fascist ambience¹⁵⁸, a modern version of an operetta with deletions from and additions of films to the original script¹⁵⁹ and an altered poster¹⁶⁰.

On the facts of *The Paris Novel* case¹⁶¹, D will try to establish prejudice to his honour or reputation as a result of E's parody novel, and thus argue that his integrity right has been infringed. In turn, E will have to rely on a statutory defence. Although there is no exception in the 1965 Law regarding parody, E is entitled to turn to the "free use" provision that protects derivative works "created without the consent of the author of the used work" provided it is "independent"¹⁶². "Independent" has been interpreted to mean that the "characteristic features of the original [work] fade or completely disappear"¹⁶³, that the new work has gained an "inner distance" from the original work¹⁶⁴. This interpretation was confirmed in the case of *Asterix Parodies*¹⁶⁵, where the BGH stated that "The difference required, in the case of fair use, in relation to the borrowed, peculiar features of the utilised work can also exist – even in a case

¹⁵⁷ For a discussion of the integrity right under the 1965 Law, see para. 1.3.2.3.

¹⁵⁸ *Neo-Fascist Slant In Copyright Works*, OLG Frankfurt-am-Main, December 6, 1994: [1996] E.C.C. 375.

¹⁵⁹ *Maske in Blau*, BGH, April 29, 1970; (1971) G.R.U.R. 35

¹⁶⁰ *Viel Spass Mit*, LG Munich I, August 2, 1966: (1974) Copyright 97.

¹⁶¹ The facts of this hypothetical case are set out in para. 3.2.

¹⁶² Author's Right and Related Protection Rights Law 1965, article 24(1).

¹⁶³ *Sherlock Holmes* case, BGH, February 2, 1958: (1959) G.R.U.R. 402.

¹⁶⁴ *Alcolix* case, BGH, March 11, 1993: (1994) G.R.U.R. 206, (1994) 25 I.I.C. 605.

¹⁶⁵ BGH, March 11, 1993: (1994) 25 I.I.C. 605, at 610.

of an obvious appropriation, especially in the formal make up – where the new work, on the basis of original, creative authorship, maintains such an internal distance in relation to the borrowed, peculiar features of the pre-existing work that the new work must be viewed as being independent. In such a case, the borrowed, peculiar features of the pre-existing work also ‘fade’ in the new work, albeit in a broader sense: they become superimposed by the new work’s original, creative content”¹⁶⁶.

As a result of the *Alcolix* case¹⁶⁷, a case with similar facts to the those at issue, it is questionable whether E will succeed in establishing the required inner distance and thus be allowed to rely on the free use defence. The court’s assessment of this issue would appear to depend on the extent of features used in E’s novel that were borrowed from D’s original work, and whether the former employed sufficient creativity to render his novel independent of the latter’s work. It could be argued that, provided that E has not copied or extensively borrowed the personal features of D’s work, E could succeed in invoking the free use defence.

Alternatively, E could argue that his right of freedom of expression could, in these circumstances, constitute a defence *per se*. It is clear that there is no statutory defence of freedom of expression under German law. However, there has been a limited number of cases where courts have commented upon the interaction between the author’s integrity right and another party’s freedom of expression.

In 1968, the Berlin Court of Appeal¹⁶⁸ held that the re-publication, without permission, of cartoons stereotyping students by a Berlin periodical, was justified as it took place in the context of a critical analysis of the way left-wing Berlin students were being portrayed by the Springer press. The Court ruled that

¹⁶⁶ BGH, March 11, 1993: (1994) 25 I.I.C. 605, at 615.

¹⁶⁷ In the *Alcolix* case, BGH, March 11, 1993: (1994) G.R.U.R. 206, the defendant’s story line used figures of Alcolix and Obelix. The plaintiffs argued that the work was an adaptation of the Asterix series, in which they owned the copyright, that elements of the Asterix characters had been used and, that the moral rights of the artists and text writers had been infringed. The Supreme Court held that the original main characters were protected under copyright. See Pilny, K.H., “Germany: Copyright: Protection of Comic Strips under Copyright Law – ‘Alcolix/Asterix’ – Parodies” (1995) 17(7) E.I.P.R. 198.

¹⁶⁸ *Bild Zeitung*, Court of Appeal (Kammergericht) Berlin, November 26, 1968, [1969] 54 U.F.I.T.A. 296.

copyright law should be interpreted in the light of the free speech provision as enshrined in article 5 of the German Basic Law¹⁶⁹.

In 1984, the BGH gave its decision in the case of *Re the Parodying of Cigarette Advertising*¹⁷⁰. The case involved a claim by a cigarette distributor for an injunction preventing an anti-smoking campaign for distributing a parody of its advertisement. The court, in rejecting the distributor's claim and refusing to grant an injunction, referred, among other issues, to the relationship between "personality rights" and freedom of expression stating that: "The calendar affects the defendant's interests relating to its enterprise, which are protected by its personality rights and the right in the business which it has established and carries on The defendant complains of the use of its trade mark and the image it has created by advertising for an anti-smoking campaign, particularly by ridicule in a way which causes it to consider itself disparaged and discriminated against"¹⁷¹. The parody was allowed "...the plaintiff may place the defendant at the forefront of its criticism only if it appears materially justified when weighed against the defendant's economic interests. Also, contrary to the appellant's opinion, the calendar sheet does not expose the defendant to ridicule in a discriminatory manner or even disparage it in a defamatory manner"¹⁷².

More recently, in 2000, the Federal Constitutional Court in Karlsruhe lifted a 1998 injunction against the publisher of Germania 3 *Gespenster am toten Mann*, Heiner Moller's last play, strengthening freedom of art in Germany. The court rejected Brecht's heirs claims that Moller had slandered Brecht by parodying several Brecht poems. In addition, Moller's ironic naming of Brecht's partners as the "three Brecht widows" was held not to be insulting.

At this stage of the development of the jurisprudence, it is difficult to predict how the German courts would decide *The Paris Novel* case, in particular their approach to balancing the moral right of integrity against freedom of expression. Even though author's right law in Germany does not expressly provide for a freedom of expression defence, the courts do appear to be willing to take a party's right of freedom of expression into account. In addition, the availability of

¹⁶⁹ For a discussion of provisions of Article 5, see para. 2.5.5.

¹⁷⁰ BGH, April 17, 1984, (1986) E.C.C. 1.

¹⁷¹ BGH, April 17, 1984, (1986) E.C.C. 1, at 4.

¹⁷² BGH, April 17, 1984 (1986) E.C.C. 1, at 6.

the free use defence does constitute a basis, albeit limited, for the alleged infringer to safeguard his freedom of expression.

3.6 SUMMARY

The debate of relationship between copyright and freedom of expression has become prominent in recent years. The debate has primarily focused on the economic aspect of copyright and how this aspect can give rise to conflicts with the right of freedom of expression. The debate has also concentrated on the theoretical justifications of the respective rights and to what extent these justifications overlap, clash or create unresolved concerns. However, absent from this debate has been the issue of moral rights and how such rights might impact on the individual's right of freedom of expression. The lack of scholarly commentary and jurisprudence may be due to a number of reasons. At the international, regional and national levels, moral rights occupy positions of varying importance. At the one end of the spectrum, are the civil law countries, which place great emphasis on the personality of the author and his intellectual creations and thus, moral rights. At the other end are the common law countries, which place greater emphasis on the author's economic exploitation rights. At the international level, not all copyright instruments oblige their member States to recognise moral rights. Such variation coupled with the fact that freedom of expression has relatively recently begun to be discussed in the context of copyright infringement, in the majority of countries, could underlie the delayed legal reaction towards the right's relationship with the author's moral rights.

This Chapter examined the relationship between the two sets of rights in order to ascertain whether, and if so to what extent, clashes do at present or may in the future arise between the rights. Overall, the legal picture in this context lacks uniformity, not only among the various levels but also among national laws. On the international and regional levels, there appears to be lack of legislative and judicial guidance on the issue. On a national level, some countries arguably afford a higher level of protection to the author's moral rights while others appear more willing to take account of another party's freedom of expression. It is suggested that copyright law should be supplemented at an international level to take into account of the relationship between every author's basic moral rights and every individual's right of freedom of expression. This is proposed in order to alleviate the current lack of guidance and uniformity and in order to resolve

any clashes that are evident at present and to prevent further conflicts from arising in the future¹⁷³.

¹⁷³ Further details in Chapter 6.

CHAPTER 4

Economic Rights and Freedom of Expression: Areas of Potential Conflict

4.1 GENERAL OVERVIEW

This Chapter consists of an enquiry into the relationship between an author's economic rights and another party's right of freedom of expression. This relationship is examined on the international, regional and national levels in order to ascertain whether and, if so, under what circumstances, there can be instances of conflict or overlap between the two sets of rights.

As far as economic rights are concerned, there is a large degree of variation in the number of such rights vested in the author among national laws. At the one end of the spectrum, the French Intellectual Property Code basically provides for two economic rights (reproduction and communication to the public)¹, while, at the other end, the German Author's Right and Related Protection Rights Law guarantees the author more than ten separate exclusive rights². It can however be suggested that, despite the existence of diverse rights, most economic rights can be classified under the rights of reproduction or communication to the public³.

In the context of the of the author's economic rights with another party's right of freedom of expression, the Chapter focuses on the right of reproduction since examples of actual and potential conflict with freedom of expression arise in various national jurisdictions.

¹ French Intellectual Property Code 1992, article L.122-1.

² Author's Right and Related Protection Rights Law 1965, articles 15-27.

³ In general, in the context of economic rights, reproduction refers to the action of making a copy, or to a copy produced through reproduction. Communication to the public refers to the act of communicating a work to the public through a number of means, ranging from giving a public performance of the work to communicating the work by broadcasting or over the internet.

For a more detailed discussion of an author's basic economic rights, see para. 1.3.2.4.

As far as the economic right of communication is concerned, case law in the area of conflict of rights does not appear to have developed. Nevertheless, conflicts are theoretically possible and the types of such conflicts will be similar to those identified in the context of the right of reproduction.

This Chapter is primarily designed to provide a comprehensive answer to the following question: Are there or can there be circumstances where the author's invoking of his economic right of reproduction in his work can interfere with or otherwise restrict another party's freedom of expression, and vice versa? If such conflicts can be established or potential conflicts foreseen, they could amount to a serious gap in the present national laws, such conflicts going to the heart of the relations between the author, the party using his work and the general public.

4.2 CASE FOR COMPARISON

In the Chapter, a hypothetical "standard" case⁴ is taken for the purpose of comparison at various levels, namely:

The Historical Novel Case

A is the author of a well-known novel. The fictional work's central theme is the relationship between two athletes competing in the Olympic Games in Ancient Greece. Through its storyline, A depicts the free daily life of women and their valued assistance in the organisation of (but not participation in) the Games.

B is the author of a sequel to A's novel. B's novel makes use of several elements of A's work, including plots, scenes and characters with a view to showing that A had given a distorted picture of the way of life of women in Ancient Greece. B portrays the discrimination women to which were, according to him, subjected, while the work's focus on their exclusion from the Olympic Games appears to be indicative of their derogatory treatment.

⁴ For the purposes of the present analysis, infringement of the author's economic rights is not taken into consideration in this Chapter, this aspect having been considered in Chapter 3.

4.3 COMPARISON AT INTERNATIONAL LEVEL

Article 9(1) of the Berne Convention guarantees “authors of literary and artistic works”, among rights, “the exclusive right of authorising the reproduction of these works, in any manner or form”. Article 9(2), added in the Stockholm Revision Conference, contains general provisions concerning limitations on the reproduction right⁵.

Against this framework, the Convention sets out a number of restrictions on the reproduction right under the heading of “free uses of works”. It provides for a mandatory limitation for the making of quotations under Article 10(1). In addition, the Convention sets out a number of discretionary exceptions, including certain uses of lectures and addresses⁶, the use of illustrations for teaching⁷ and the use of works for the purpose of reporting current events⁸.

On the facts of *The Historical Novel* case⁹, A will claim that B has infringed his right of reproduction through the unauthorised copying of extracts from his novel. In order to rebut the presumption of copyright infringement, B will have to invoke a defence or limitation under the Berne Convention. It is submitted that B could rely on the defence of making quotations¹⁰. However, in order to succeed, he will have to prove that the making of his book is compatible with fair practice, and that the extent of copying that took place does not exceed that justified by the particular purpose¹¹. Therefore, a court would have to balance the two rights and reach a conclusion on the basis of the above-mentioned factors.

Alternatively, B could invoke his right of freedom of expression in order to justify his actions vis-à-vis A's copyright work. On the international level, freedom of

⁵ Union countries are allowed to permit reproduction of works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. These conditions constitute the so-called three-step test. For an analysis of the historical background and scope of the author's reproduction right, see Ricketson and Ginsburg at pp. 622-45.

⁶ Berne Convention 1971, Article 2*bis*(2).

⁷ Berne Convention 1971, Articles 10(2) and 10(3).

⁸ Berne Convention 1971, Article 11*bis*.

⁹ The facts of this hypothetical case are set out in para. 4.2.

¹⁰ Berne Convention 1971, Article 10(1).

¹¹ It appears that, on the present facts, there is no other defence under the Berne Convention that B could invoke to justify his use of A's work.

expression is safeguarded under the Universal Declaration of Human Rights 1948¹² and the International Covenant on Civil and Political Rights 1966¹³. In this case, a court would again be called upon to weigh the parties competing interests and reach a decision on the basis of legislative interpretation and judicial precedent.

For the purposes of the present examination of the relationship between the author's reproduction right and another party's freedom of expression, it is difficult to analyse the courts potential approach to such claims under the given facts, or reach a comprehensive conclusion as to the underlying reasoning to their potential decision. The Berne Convention, as the Universal Declaration and International Convention on Civil and Political Rights, is an instrument whose primary purpose is to set minimum standards of copyright protection which its country members must observe. Consequently, each country has put in place its own copyright and human rights legislation¹⁴ and this may provide authors and other parties alike with greater protection than that afforded under the respective international instruments. On an international level, there is little, if any, case law on the subjects of copyright infringement *per se* or copyright infringement vis-à-vis freedom of expression. It would be unsound to reach any conclusions on the rights relationship under such general provisions and lack of judicial guidance and interpretation.

4.4 COMPARISON AT REGIONAL LEVEL

A comparison can be made of the respective copyright and human rights instruments in the context of the relationship between economic rights and freedom of expression within the American region but not in Europe or Africa where there are no general regional copyright agreements.

In the American region, the human right of freedom of expression is guaranteed under the American Convention on Human Rights 1969¹⁵. The relevant copyright

¹² Article 19. For a general discussion of the Universal Declaration and Article 19 in particular, see para. 2.3.2.

¹³ Article 19. For a general discussion of the Covenant and Article 19 in particular, see para. 2.3.3.

¹⁴ The relevant legislative provisions are analysed and critically examined in paras. 4.5.2 (United Kingdom), 4.5.3 (United States of America), 4.5.4 (France) and 4.5.5 (Germany).

¹⁵ Article 13. For a discussion of the Convention and the right of freedom of expression, as defined therein, see para. 2.4.3.

instruments are NAFTA and Cartagena Decision 351. Both instruments make provision for the author's economic rights. NAFTA sets out that authors and their successors in interest shall have, in respect of their works, the exclusive rights enumerated in the Berne Convention, including the first public distribution of the original and each copy of the work by sale, rental or otherwise¹⁶. Cartagena Decision 351 imposes the obligation to grant the author or his successors in title, among other rights, the exclusive right of reproduction¹⁷.

The Cartagena Decision 351 is generally consistent with the TRIPS Agreement and the Berne Convention. However, it is generally considered to serve as a tool for integration within the Andean Community and for setting the stage for further enhancement of intellectual property protection. Each of its member countries¹⁸ has developed its own copyright legislation, safeguarding, among other rights, the author's economic rights. As such, case law on economic rights under this instrument over the years has been sparse. Thus, for the purposes of the present examination, Cartagena Decision 351 cannot provide an adequate forum for examining the interaction between the author's right of reproduction and freedom of expression. Any cases regarding such issues would generally arise on a national level. It would be unsound to reach any conclusions on the rights relationship to each other under such general provisions and lack of judicial guidance and interpretation.

4.5 COMPARISON AT NATIONAL LEVEL

4.5.1 INTRODUCTION

This Part examines the relationship between the author's economic right of reproduction and another party's right of freedom of expression on a national level. The countries whose laws are analysed are the United Kingdom, the United States of America, France and Germany.

In order to provide a general overview of the rights relationship, the respective sections examine the following issues:

¹⁶ NAFTA, Article 1705(2).

¹⁷ Cartagena Decision 351, Article 13.

¹⁸ Bolivia, Colombia, Ecuador, Peru, Venezuela (subject to confirmation).

- (i) whether freedom of expression is or could be effectively accommodated within the framework of existing legislative limitations and defences to copyright infringement, and
- (ii) whether freedom of expression *per se* is afforded sufficient recognition as an actual or potential limitation or restraint to the author's exclusive right of reproduction.

The following Tables summarise the relevant rights and legislative provisions that are considered under each national law.

United Kingdom		
Reproduction Right	Limitations	Freedom of Expression
Section 18(1) CDPA 1988	Section 30 CDPA 1988	Article 10 ECHR Section 12 HRA

United States		
Reproduction Right	Limitations	Freedom of Expression
Section 106(1) Copyright Act 1976	Section 107 Copyright Act 1976	First Amendment to the US Constitution

France		
Reproduction Right	Limitations	Freedom of Expression
Article L.122-1 French Intellectual Property Code 1992	Article L.122-5-3 French Intellectual Property Code 1992 Article L.122-5(4) French Intellectual Property Code 1992	Article 10 ECHR

Germany		
Reproduction Right	Limitations	Freedom of Expression
Article 15(1) Author's Right and Related Protection Rights Law 1965	Article 24(1) Author's Right and Related Rights Law 1965	Article 5 German Basic Law

4.5.2 UNITED KINGDOM

4.5.2.1 REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION

Under the CDPA 1988, the author's right of reproduction is described as an "act restricted by copyright"¹⁹ and "copying in relation to any description of work includes the making of copies which are transient or incidental to some other use of the work"²⁰. Copying²¹ in relation to a literary, dramatic, musical or artistic work²² is defined as "reproducing the work in any material form", including storing the work in any medium by electronic means²³. "The issue to the public of copies of the work"²⁴ is also an act restricted by copyright in every description of copyright work.

Against this background of exclusive rights of the copyright owner, the CDPA provides for an extensive list of acts that may be done in relation to copyright without infringing it. The limitations are set out in Chapter III of the CDPA and include, among other provisions²⁵, fair dealing with a literary work, or a dramatic, musical or artistic work for the purposes of research or private study²⁶, fair dealing with a work for the purpose of criticism, review or reporting of current events (accompanied by sufficient acknowledgement, where necessary)²⁷, the incidental

¹⁹ CDPA 1988, section 1(2) and Chapter II (sections 16-22).

²⁰ CDPA 1988, section 17(6).

²¹ What constitutes copying in relation to a film, television broadcast or cable programme, and the typographical arrangement of a published edition, is also defined in sections 17(4) and 17(5).

²² Note that there is an additional provision in relation to the copying of an artistic work, including "making a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work". See CDPA 1988, section 17(3).

²³ CDPA 1988, section 17(2).

²⁴ CDPA 1988, section 18(1). This exclusive right of the copyright owner is further defined in sections 18(2) – (4).

²⁵ Other exceptions outlined in Chapter III regard use of copyright works in connection with education (sections 32-36A), exceptions for copying by libraries and archives (sections 37-44), exceptions regarding public administration (sections 45-50), exceptions in the case of design documents (sections 51-53) and a number of other miscellaneous provisions (sections 57-76).

²⁶ CDPA 1988, section 29(1). Sections 29(2) - (4) contain various provisions concerning the application of the general rule in section 29(1). There are similar provisions regarding databases under section 29(1A).

²⁷ CDPA 1988, section 30. The provisions are subject to a further condition that the work has been made available to the public, and section 30(1A) defines what constitutes "making available to the public".

inclusion of copyright material in certain categories of work²⁸, and adaptations of a work²⁹.

On the facts of *The Historical Novel* case³⁰, A will bring a claim of copyright infringement against B under section 16(1)(a) of the CDPA 1988. A will have the burden of proving that the defendant, B, has copied his work, but, having discharged that burden, the burden of proof will then shift to A who will have to rebut this inference, and “this burden has, broadly speaking, not been found easy to discharge in a number of cases”³¹. In order for A to succeed in his claim, he will have to prove that B has copied a substantial part of his work. In deciding whether a substantial part has been copied, the courts will look at B’s work as a whole³². Substantiality will be judged on a qualitative basis³³; even a relatively short part of a work can amount to a substantial part if it is an essential part of the work³⁴. Courts will also have regard to whether B has added elements and expressions to his work that were not present in A’s novel and thus distinguish his work from the earlier one³⁵. In order to determine whether the parts of A’s work copied in B’s novel constitute a substantial part courts will consider if they were important enough in A’s novel, when viewed in its entirety; more specifically, they shall have regard at the “number and extent of the extracts” and ask whether they are “too many and too long to be fair”³⁶. As regards B’s use of plots and scenes from A’s novel, the courts will examine whether B has added to them original features so as to distinguish them, and hence his work, to an extent, from A’s work. It is unclear whether the courts will rule that, on these facts, B copied a substantial part of A’s work. If the courts decide that B’s use of A’s work does not amount to a substantial part, the

²⁸ CDPA 1988, section 31.

²⁹ CDPA 1988, section 76.

³⁰ For the facts of this hypothetical case, see para. 4.2.

³¹ See, *Sterling* at pp. 450-51.

³² *Francis, Day & Hunter Ltd v. Bron* [1963] Ch. 587; *Betsen v. CBS United Kingdom Ltd* [1994] E.M.L.R. 467.

³³ It must be borne in mind that courts will also take account of the well-established principle that B is allowed to make use of the underlying ideas in A’s novel. See, *L.B. (Plastics) Ltd v. Swish Products Ltd* [1979] R.P.C. 551, HL; *Johnstone Safety Ltd v. Peter Cook (Int.) Plc* [1990] F.S.R. 161, C.A.; *Harman Pictures N.V. v. Osborne* [1967] 1 W.L.R. 723. The principle of the idea/expression dichotomy is extensively examined in para. 5.4.

³⁴ *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] Ch. 593; *Francis, Day & Hunter Ltd v. Bron* [1963] Ch. 587.

³⁵ *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001] 1 W.L.R. 2416.

³⁶ *Hubbard v. Vosper* [1972] 2 Q.B. 84, per Lord Denning.

latter's claim will be dismissed. If, however, they come to the opposite conclusion, the burden will shift on B to prove that copyright infringement has not taken place. In order to prove this, it is submitted that B can rely on a number of grounds, namely that his work is a parody, the work amounts to fair dealing for the purposes of criticism or review and freedom of expression.

As far as the parody argument is concerned, there is no express statutory parody defence under UK copyright law, however B could invoke this defence in two contexts: either argue that his work is a parody of A's novel and should thus be permitted purely on this basis, or argue that even though parody is not expressly defined as a permitted act to copyright, it falls within the scope of the fair dealing defence under section 30 of the CDPA. It should be noted that although Article 5(3)(k) of the Information Society Directive 2001 allows member states to provide a "caricature, parody or pastiche" exception, the UK has chosen not to take advantage of this provision by a statutory exception³⁷. It is interesting to point out that there appears to be no case law to date where UK courts have had to rule directly on the question of whether parody can be considered a defence to copyright as such, or a form of fair dealing. One of the reasons for this could be the fact that a parodist will not necessarily have copied a substantial part of the original work. This was the case in *Glyn v. Weston Feature Film Co.*³⁸ and *Joy Music v. Sunday Pictorial Newspapers (1920) Ltd*³⁹ where the courts held that the defendants had not copied a substantial part of the plaintiffs original works; consequently, the courts did not have to take stance regarding the position of parody in this context⁴⁰. Thus, the courts decision will heavily depend on whether substantial copying has occurred⁴¹; the defendant's intention of creating a parody of the plaintiff's work will not constitute a defence if what has been taken is a substantial part of the earlier

³⁷ See, Gredley, E. and Maniatis, S., "Parody: A Fatal Attraction? Part 1: The Nature of Parody and Its Treatment in Copyright" (1997) 7 E.I.P.R. 339.

³⁸ [1916] 1 Ch. 261 (Ch. D.) (The case concerned the making of a film parodying a novel).

³⁹ [1960] 2 W.L.R. 645; [1960] 1 All E.R. 703 (The case concerned a musical parody).

⁴⁰ Note that in *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, Ch. D., Younger J. stated *obiter* that if the issue of parody were to be considered, the defendant's claim that his work was a parody and thus did not infringe the plaintiff's copyright could have succeeded.

⁴¹ For an analysis of what constitutes a substantial part and relevant case law, see Garnett, K., Davies, G. and Harbottle, G., *Copinger and Skone James on Copyright* (15th ed., Sweet & Maxwell, 2005) at pp. 380-95.

work⁴². It could therefore be concluded that it is unlikely that B would succeed on this ground. Courts do not appear to consider parody as a defence to copyright infringement and neither do they seem willing to create such a precedent.

On this basis, B could alternatively rely on the permitted act of fair dealing as an indirect means of protecting his parody work. UK courts have generally interpreted the fair dealing provisions strictly⁴³. In addition, the list of permitted acts under this provision is clearly exhaustive in nature. The list cannot be used by the courts as a general guide to permitted acts⁴⁴. Instead, the particular circumstances of each case will have to be brought into line with the statutory provisions. In other words, since there is no express statutory defence covering parody, the party wishing to rely on it must ensure that it corresponds exactly to one of the objectives allowed under the fair dealing provisions⁴⁵ before the courts will consider whether the use of the other work is fair.

It can therefore be concluded that B is unlikely to be successful by arguing that his work, as a parody, falls within the scope of any of the fair dealing provisions.

Consequently, B will have to rely on the fair dealing provision under section 30 of the CDPA and claim that his work should be allowed as it merely reviews and/or criticises A's work. In this case, the courts will assess whether B's use of A's work can be described as fair. In their assessment, the court will judge B's activities on the objective basis of whether a fair minded and honest person would have dealt with A's work in the same manner as B did under the given circumstances. Courts

⁴² *Williamson Music Ltd v. Pearson Partnership* [1987] F.S.R. 97 (The lyrics of Oscar Hammerstein II's song "There is Nothin' Like a Dame" were parodied – but not copied – for use in a bus service advertisement. Held: no copyright infringement since there was no substantial copying); *Schweppes Ltd v. Wellingtons Ltd* [1984] F.S.R. 210 (The plaintiffs claimed infringement of their label, SCHWEPPE, by the defendants' label, SCHLURPPE, in relation to Indian tonic water. The defendants argued that their label was a joke in the nature of a caricature. Held: parody constitutes no defence to copyright infringement).

⁴³ See, Sterling at pp. 450-51.

⁴⁴ See, Spitz, B., "Droit D'Auteur, Copyright et Parodie, Ou Le Mythe De L'Usage Loyal" (2005) 204 R.I.D.A. 54 at 78.

⁴⁵ *Pro Sieben Media A.G. v. Carlton UK Television Ltd* [1998] F.S.R. 43 at 49; *Beloff v. Pressdram* [1973] 1 All E.R. 241 at 262.

will consider a number of factors⁴⁶ in assessing whether a fair dealing defence should be available on the facts of the case, including the purpose and type of use made of the quotations and extracts⁴⁷, and the proportion of the work consisting of quotations and extracts as compared with the proportion of the work consisting of comment and analysis⁴⁸. UK jurisprudence has interpreted the scope of criticism and review as not necessarily confined to the literary style or merit of the original work but extending to the thoughts and ideas underlying that work⁴⁹. In this context, it is not clear whether, on the facts of this case, B would succeed in invoking the fair dealing defence; the court's decision will depend on its assessment of the purpose and nature of B's work and the amount of extracts it has used from A's work.

Apart from the defences already discussed, B could also invoke his right of freedom of expression, as enshrined in Article 10 of the European Convention of Human Rights⁵⁰, applicable in the UK under section 12 of the Human Rights Act⁵¹.

UK case law in this area appears to be limited. However, the effect of the Human Rights Act, and in particular freedom of expression, on copyright law was discussed in the leading case of *Ashdown v. Telegraph Group Ltd*⁵². On the facts of the case, a national newspaper, the Sunday Telegraph, appealed against an earlier

⁴⁶ For further discussion of this non-exhaustive list of factors that courts have taken into account when considering whether the use of a work was fair, see Garnett, K., Davies, G. and Harbottle, G., *Copinger and Skone James on Copyright* (15th ed., Sweet & Maxwell, 2005) at pp. 498-500.

⁴⁷ *Hyde Park Residence Ltd v. Yelland and Others* [2001] Ch. 43; *British Broadcasting Corp. v. British Satellite Broadcasting Ltd* [1992] Ch. 141; *Newspaper Licensing Agency Ltd v. Marks and Spencer Plc* [2001] Ch. 257; [2001] R.P.C. 76.

⁴⁸ *Pro Sieben Media A.G. v. Carlton UK Television Ltd* [1999] 1 W.L.R. 605; [1999] F.S.R. 610, C.A.; *Independent Television Publications v. Time Out* [1984] F.S.R. 64; *PCR Ltd v. Dow Jones Telerate Ltd* [1998] F.S.R. 170; *Time Warner Entertainment Ltd v. Channel 4 Television Corporation Plc* [1994] E.M.L.R. 1.

⁴⁹ *Hubbard v. Vosper* [1972] 2 Q.B. 84.

⁵⁰ The provisions of Article 10 are examined in para. 2.3.2.3.

⁵¹ The provisions of section 12 are discussed in para. 2.4.2. On the hierarchy level of Article 10 and section 12, it has been suggested that the Article 10 rights have been intended to be given pre-eminence over the equivalent provisions in the Human Rights Act – “It seems to us that section 12 does no more than underline the need to have regard to contexts in which [the Strasbourg] jurisprudence has given particular weight to freedom of expression, while, at the same time, drawing attention to considerations which may nonetheless justify restricting that right”, *Ashdown v. Telegraph Group Ltd* [2002] Ch. 149, C.A., at para. 27. Note however that in the earlier case of *Imutran Ltd v. Uncaged Campaigns Ltd* [2001] 2 All E.R. 385, Sir Andrew-Morrill V.C. took into account the requirements of section 12 in a copyright infringement case where Article 10 was also involved.

⁵² [2001] E.M.L.R. 44. This decision is also discussed in para. 2.5.2.3.

decision⁵³ to grant summary judgement to a well-known politician, Paddy Ashdown, in his claim for copyright infringement. The politician was contemplating publishing his political memoirs; among other documents, the minutes of a meeting with the Prime Minister was shown in confidence to representatives of newspapers and publishers. Subsequently, the newspaper published verbatim quotations from the minutes. The defendant newspaper asserted that the Court was obliged, under section 3(1) of the Human Rights Act, to take into account the right of freedom of expression, under Article 10 of the European Convention, in assessing the defences of fair dealing⁵⁴ and public interest⁵⁵ under the CDPA 1988. The Court of Appeal, dismissing the newspaper's appeal, held that its publication of extracts of A's meeting was mainly done for commercial purposes and could not be justified by public interest considerations. The court acknowledged that it is "a rare case where it is in the public interest that the words in respect of which another has copyright should be published without any sanction"⁵⁶. Nevertheless, the court went on to state that, given the right circumstances, the defence of public interest could apply to breach of copyright⁵⁷. On the scope of freedom of expression, Lord Phillips M.R. commented that "The prime importance of freedom of expression is that it enables the citizen freely to express ideas and convey information. It is also important that the citizen should be free to express the ideas and convey the information in a form of words of his or her choice. It is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words devised by someone else"⁵⁸. In other words, since information and ideas are not protected as such by copyright, it is unlikely that, in practice, copyright can operate as a considerable restraint on freedom of expression. However, he did acknowledge that, on a theoretical level, "copyright is antithetical to freedom of expression" since the "Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to

⁵³ [2001] 2 W.L.R. 967.

⁵⁴ CDPA 1988, section 30. Fair dealing is also discussed in para. 5.2.1.

⁵⁵ CDPA 1988, section 171(3) which provides that "Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise". The public interest aspect is further analysed in para. 5.3.

⁵⁶ [2001] E.M.L.R. 44, at para. 47.

⁵⁷ [2001] E.M.L.R. 44, at para. 57.

⁵⁸ [2001] E.M.L.R. 44, at para. 31.

do”⁵⁹, copyright being essentially a negative right⁶⁰. Overall, having established an infringement of the CDPA 1988, the court did not deem necessary to examine further the relationship of the two rights⁶¹.

Two important aspects of the *Ashdown* case may be noted⁶². Firstly, the court discussed, to an extent, the approach to cases of copyright infringement involving the invoking of freedom of expression. Even though the court did not directly rule on the predominance of the rights, it did demonstrate the courts hesitation to override the copyright owner’s interests in favour of freedom of expression. Secondly, by suggesting that the public interest defence could in certain circumstances be available in relation to copyright infringement⁶³ – although it kept a cautionary stance by clarifying that what would amount to such circumstances was not capable of precise categorisation or definition – it left a window open for freedom of expression to be indirectly invoked and accommodated under that heading⁶⁴.

On the facts of *The Historical Novel* case, it could be argued that, on the basis of the *Ashdown* decision, B would not succeed in a claim based on freedom of expression. The right is not recognised as a defence *per se*, and it is unlikely that B’s novel content, or indeed his criticism of A’s portrayal of persons with physical disabilities to be in the public interest. The *Ashdown* judgement made clear that the public interest defence will only override copyright in rare and compelling circumstances. It seems unlikely that the present facts could remotely fall in this category. Thus, the sole way that B’s copying of A’s work could be allowed would be under the fair dealing defence for the purposes of criticism or review; and even on this ground, given the restrictive interpretation and approach traditionally adopted by UK courts, the outcome is uncertain - on the facts of *Ashdown*, the Court of Appeal rejected the fair dealing defence.

⁵⁹ [2001] E.M.L.R. 44, at para. 30.

⁶⁰ Despite sections 2(1) and 16(2).

⁶¹ [2001] E.M.L.R. 44, at para. 83.

⁶² For analyses of the *Ashdown* case, see Burrell, R., “Reining in Copyright: Is Fair Use the Answer?” (2001) 4 I.P.Q. 361, and Griffiths, J., “Copyright Law After *Ashdown* – Time to Deal Fairly with the Public” (2002) 3 I.P.Q. 240.

⁶³ See Garnett, K. QC, “The Impact of the Human Rights Act 1998 on UK Copyright Law” in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005) at p. 176.

⁶⁴ Also, see para. 5.3.

Having examined the relevant legislative provisions and case law, it could be argued that the UK system is generally strict in its approach to assessing copyright limitations and defences. This has been illustrated to be the case with the fair dealing and public interest provisions. Court reasoning has been rather rigid and it appears that, irrespective of the cases given facts, court decisions have, in the majority, turned on the amount of copying that had occurred and, to a lesser extent, the purpose and the nature of the later works, and the interests of the general public. It has been suggested that the underlying reason for this approach could be the argument that there is no place in UK law for the notion that, if an idea can only be expressed in one way, it cannot be the subject of copyright⁶⁵. It appears to be the case that, in cases of copyright infringement involving fair dealing, the right of freedom of expression does not, in substance, come into play. Courts seem to be more willing to consider the right in cases where there is an important public interest⁶⁶. However, even in such cases, the "Article 10 right to freedom of expression is only ever likely to override the rights of the copyright owner where there is a compelling public interest in the publication of the very expression of an author's ideas or information, and which the rigorous application of the 1988 Act would otherwise prevent"⁶⁷. Overall, it could be submitted that the odds of freedom of expression being accommodated under these statutory exceptions are low.

As far as the invoking of freedom of expression *per se* is concerned, it could be asserted that the situation is not clear, mainly due to the limited jurisprudence on this matter. Despite the fact that courts appear to recognise that there could be instances of conflicts between that right and copyright, they are hesitant, if not unwilling, to pave the way for an in-depth examination of the rights interaction. The Court of Appeal in *Ashdown* stated that:

"The infringement of copyright constitutes interference with 'the peaceful enjoyment of possessions'. It is, furthermore, the interference with a right

⁶⁵ *IBCOS Computers Ltd v. Barclays Mercantile Highland Finance Ltd* [1994] F.S.R. 275, at 291.

⁶⁶ Such cases are examined and more detailed conclusions are drawn in para. 5.3.

⁶⁷ See Garnett, K. QC, "The Impact of the Human Rights Act 1998 on UK Copyright Law" in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005) at p. 207.

arising under a statute which confers rights recognised under international convention and harmonised under European law – see the Berne Conventions of 1886 and 1971 and EC Council Directive of 29 October 1993. There is thus no question but that restriction of the right of freedom of expression can be justified where necessary in a democratic society in order to protect copyright. The protection afforded to copyright under the 1988 Act is, however, itself subject to exceptions. Thus, both the right of freedom of expression and copyright are qualified. This appeal raises the question of how the two rights fall to be balanced, when they are in conflict⁶⁸.

Nevertheless, it could safely be argued that courts have not, to date, embarked into such a substantial balancing process. As to the potential suggestion of freedom of expression *per se* constituting an independent defence to copyright infringement, it is submitted that the following statement by Lord Phillips in *Ashdown* accurately summarises the current stance of the UK courts: “I can see no reason why the court should travel outside the provisions of the 1988 Act and recognise on the facts of the particular case further or other exceptions to the restrictions on the exercise of the right to freedom of expression constituted by the 1988 Act”⁶⁹.

4.5.3 UNITED STATES OF AMERICA

4.5.3.1 REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION

Section 106 of the 1976 US Copyright Act guarantees authors, among other rights⁷⁰, the exclusive right to “reproduce the copyrighted work in copies or phonorecords”⁷¹. Against the copyright owner’s exclusive rights, the Act provides a

⁶⁸ [2002] Ch. 149, C.A., at para. 28.

⁶⁹ [2002] Ch. 149, C.A., at para. 38.

⁷⁰ Other exclusive rights of the author include the right to prepare derivative works based upon the copyrighted work (section 106(2)); the right to distribute copies or phonorecords of the copyrighted work to the public by sale, rental, lease or lending (section 106(3)); the right to perform the work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, motion pictures and other audiovisual works (section 106(4)); and the right to display the copyrighted work publicly, in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works (section 106(5)).

⁷¹ US Copyright Act 1976, section 106(1).

long list of extensive limitations⁷². For the purposes of the current analysis, the most important limitation is that of fair use, as defined in section 107 of the 1976 Copyright Act. Under this provision, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not copyright infringement⁷³. Section 107 goes on to state that, in determining whether the use made of a work in any particular case is a fair use, the factors (hereinafter, the "fair use factors") to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the work in which copyright subsists.

On the facts of *The Historical Novel* case⁷⁴, A will claim that B's novel amounts to an infringement under section 501(a) of the 1976 Copyright Act⁷⁵ of his exclusive right of reproduction, as guaranteed in section 106(1) of the Act. If A can prove that B copied a substantial amount of his work, and hence infringed his copyright, B will rely on the following grounds: fair use for the purpose of criticism, parody under fair use and free speech.

As far as the fair use limitation is concerned, this provision has given rise to extensive case law. The wording of section 107 suggests that the statement of the fair use principle is intended to offer the courts mere guidance, rather than lay down rigid rules for courts to apply strictly; the list of factors to be taken into account when

⁷² Available limitations include reproduction by libraries and archives (section 108), the exhaustion of the distribution right (section 109), exemption of certain performances and displays (section 110), exemption of certain cable transmissions (section 111), certain limitations concerning the right to prevent use of pictures, useful articles etc. (section 113), limitations on the exclusive rights of copyright owners in sound recordings (section 114), conditions and limitations on the use of certain works in connection with non-commercial broadcasting (section 118), and limitations on the scope of rights in architectural works (section 120).

⁷³ Section 107 also provides that the fact that a work is unpublished shall not itself bar a finding of fair use, if such a finding is made upon consideration of the factors set out in the section.

⁷⁴ The facts of this hypothetical case are set out in para. 4.2.

⁷⁵ Section 501(a) provides that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121 ... is an infringer of the copyright or right of the author, as the case may be".

assessing the application of fair use appears to be illustrative and non-exhaustive⁷⁶. Courts have generally adopted a flexible approach in interpreting the fair use limitation. Courts will consider the fair use factors on the facts of each case; the factors will “be explored, and the results weighed together, in light of the purposes of copyright”⁷⁷.

In relation to the first fair use factor, namely the purpose and character of the use⁷⁸, B will argue that the purpose of his use of A's work is criticism, which is itself specifically enumerated in section 107. It has to be noted that even if B's use falls within the first factor, this will not necessarily equate to a finding of fair use; this factor must be balanced against the other factors⁷⁹. Under this factor, courts will go on to assess whether B has made “productive use”⁸⁰ of A's work. In the words of the Supreme Court in *Campbell v. Acuff – Rose Music, Inc.*⁸¹, the “central purpose” of the investigation under this factor is to determine whether “the new work merely supersedes the objects of the original creation”⁸² or adds features and character to the new work, thus rendering it a new intellectual creation. In this context, the courts will examine the extent to which the new work is transformative⁸³. Finally, courts will also take into account whether the use is of a commercial nature. It has been suggested that “any commercial use tends to cut against a fair use defence”⁸⁴ and

⁷⁶ *New Era Publications Int'l, ApS v. Carol Pub. Group*, 729 F. Supp. 992 (S.D.N.Y. 1990), *rev'd in part*, 904 F.2d, 152 F.2d (2d Cir.), *cert. denied*, 498 U.S. 921 (1990); *Basic Books, Inc. v. Kinkos Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) at 1534; *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) at 588 (Oakes, Chief Judge concurring, “I emphasize non-exclusive”); *Castle Rock Enter. v. Carol Pub. Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) at 141.

⁷⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at 577.

⁷⁸ 1976 US Copyright Act, section 107(1).

⁷⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) at 561.

⁸⁰ *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); *Twin Peaks Prods., Inc. v. Publications International Ltd*, 996 F.2d 1366 (2d Cir. 1993) at 1374-76.

⁸¹ 510 U.S. 569 (1994).

⁸² 510 U.S. 569 (1994) at 579.

⁸³ *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997) at 413, *aff'd on other grounds*, 147 F.3d 215 (2d Cir. 1998); *Riggold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) at 78; *Paramount Pictures Corp. v. Carol Pub. Group*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998) at 335; *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000) at 23; *Duffy v. Penguin Books USA Inc.*, 4 F. Supp. 2d 268 (S.D.N.Y. 1998) at 274. For an extensive analysis of the concept of transformative use, see Nimmer at para.13.05[A][1][b].

⁸⁴ *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) at 1175.

that “while commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain”⁸⁵. It appears to be the case that just because the use is of a commercial nature, that will not necessarily negate fair use⁸⁶. Commercial uses are broad. Consequently, the Supreme Court has stated that “the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”⁸⁷.

On the facts of the present case, B could potentially satisfy all the “requirements” that courts will observe. His work, it could be said, is fair for the purposes of criticism; he has added his own features in the novel; and, even though his work could be described as being of a commercial nature, his novel was arguably not created on the grounds of monetary considerations. However, every case is judged on its individual facts and it is not clear how courts would interpret the present facts under the first fair use factor.

The second fair use factor regards the nature of the work⁸⁸. Under this factor, the courts make a distinction between creative works, which are afforded greater degree of protection, and informational or factual works which receive lesser protection. In *Campbell v. Acuff – Rose Music, Inc.*⁸⁹, the court stated that “this factor calls for recognition that some works are closer to the core of intended copyright protection than others with the consequence that fair use is more difficult to establish when the former works are copied”⁹⁰. It is generally accepted that this factor “typically recedes into insignificance”. On the facts of the present case, it could be argued that the novel is likely to possess a degree of originality as it is not a work purely of an informatory nature.

⁸⁵ *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

⁸⁶ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992) at 1078. Note however the categorical statement of the Supreme Court in *Sony Corp of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) at 451, that “every commercial use of copyrighted material is presumably an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright”.

⁸⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) at 562.

⁸⁸ 1976 US Copyright Act, section 107(2).

⁸⁹ 510 U.S. 569 (1994).

⁹⁰ 510 U.S. 569 (1994) at 586. Also, see *Monster Communications, Inc. v. Turner Broadcasting Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) at 494.

The third fair use factor, namely the amount and substantiality of the portion used⁹¹, refers to whether there exists substantial similarity between the two works. The courts will look at both qualitative and quantitative similarity. It is difficult to define similarity and the courts do not have a rule of thumb but seem to base their decisions on the facts of each individual case. Court decisions have ranged from holding that copying three hundred words out of a two hundred thousand-word long book constitutes infringement since the part copied is “essentially the heart of the book”⁹², to holding that it is fair use to copy a whole magazine cover as part of comparative advertising⁹³.

On the facts of the present case, it is difficult to foresee what conclusion a court would reach. However, it appears that the more significant the parts he has copied were to A’s novel, the more likely that the courts will find a substantial similarity between the two works.

Finally, the fourth fair use factor refers to the effect upon the plaintiff’s potential market⁹⁴. This factor looks in effect at whether demand for the plaintiff’s work diminishes as a result of the defendant’s usurpation⁹⁵. The Second Circuit described this factor as aiming to strike a balance “between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that all alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need to be shown to justify the use”⁹⁶.

On the present facts it is unclear to predict how the courts would balance the parties respective interests, but it is possible that the balance would tip to holding fair use in

⁹¹ 1976 US Copyright Act, section 107(3).

⁹² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) at 566.

⁹³ *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) at 1177. For an extensive list of additional case law on this issue, see Nimmer at para. 13.05[A][4].

⁹⁴ 1976 US Copyright Act, section 107(4).

⁹⁵ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) at 1274; *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) at 438; *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986) at 425, *rev’d*, 811 F.2d 90 (2^d Cir. 1987) at 99, *cert. denied*, 484 U.S. 890 (1988).

⁹⁶ *MCA, Inc. V. Wilson*, 677 F.2d 180 (2^d Cir. 1981).

view of the judgement in *SunTrust Bank v. Houghton Mifflin Co*⁹⁷. Presumably, both parties will produce some evidence as to the economic impact of B's book on A's work has been.

Overall, it is arguable that B could succeed in a fair use defence for the purposes of criticism. US courts appear to adopt a flexible approach and consider a number of factors, judging each case on its particular facts.

Alternatively, B can rely on the fact that his work is a parody and, as such, exempt from copyright infringement, under the fair use limitation. It is interesting to note that until 1994, there was no controlling Supreme Court guidance on this issue⁹⁸. In 1994, the Supreme Court accepted the parody defence in *Campbell v. Acuff-Rose Music, Inc.*⁹⁹. On the facts of the case, the plaintiff (Acuff-Rose) alleged that the defendants song "Pretty Woman" infringed their copyright in the song "Oh, Pretty Woman". The defendants pleaded that their song was a fair use parody of the plaintiff's song. The court, reversing the Sixth Circuit's decision, accepted the defendants' version of the song to be a parody¹⁰⁰. It then went on to state that

⁹⁷ 60 U.S.P.Q. 2d 1225 (11th Cir. 2001). The case is discussed in detail below.

⁹⁸ Lower courts however did accept that parody could constitute a defence to copyright infringement provided that it did not plagiarise or seriously compete with the original work. The standard of differentiation that should exist between the works was addressed in various cases. See, *Elsemere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2^d Cir. 1980), (The song "I Love Sodom" held to be fair use parody of the song "I Love New York". The court stated that "just as imitation may be the sincerest form of flattery, parody is an acknowledgement of the importance of the thing parodied. In short, the defendant's [parody] ... has not in the least competed with or retracted from the plaintiff's work); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2^d Cir. 1964), ("Parody and satire are deserving of substantial freedom – both as entertainment and as a form of social and literary criticism" and, where "the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper"); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), (A parodist should be denied the fair use defence only if he "has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire"); *Rogers v. Koons*, 960 F.2d 301, 22 U.S.P.Q. 2d 1492 (2^d Cir. 1992), (The defendant made a sculpture of plaintiff's photograph, depicting a man and his wife and eight puppies. The court held that the defendant's action constituted copyright infringement. The sculpture was not a parody as it was difficult to discern any parody of the plaintiff's photograph, more copying than was necessary for a parody had taken place, and the plaintiff's market for his work had been prejudiced.). For a detailed discussion of pre-1994 case law on parodies, see Nimmer at para. 13.05[C][1].

⁹⁹ 510 U.S. 569 (1994).

¹⁰⁰ "...the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments

“parody, like other comment or criticism, may claim fair use under section 107”¹⁰¹. Having resolved those threshold matters in favour of the defendant, the Court considered the crucial question of where should the line be drawn between legitimate appropriation and infringement. It held that, in assessing this issue, “parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law”¹⁰². In this context, the court stressed the importance of the concept of transformative use and stated that, in general, a court’s decision of whether or not to allow a parody as fair use of a work “will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided”¹⁰³.

In 2001, the Eleventh Circuit was called upon to decide a parody case and to answer the question of whether a parody must be funny, as a matter of necessity. In *SunTrust Bank v. Houghton Mifflin Co.*¹⁰⁴, the plaintiff owned the copyright in the well-known novel by Margaret Mitchell “Gone With the Wind”. The defendant planned to publish a book entitled “The Wind Done Gone” in which the author set out to criticise Mitchell’s novel and demonstrate that it wrongly portrayed the status and condition of negro slaves. To achieve this, the defendant used characters, settings and themes from “Gone With the Wind”. The Appeal’s Court, rejecting the District Court’s conclusion, held that the defendant’s parody novel was entitled to the fair use defence. It held that, although the parody novel did not have a comic effect, it should qualify for fair use as “a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites” in “Gone With

on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing”, 510 U.S. 569 (1994) at 580-81.

¹⁰¹ 510 U.S. 569 (1994) at 579.

¹⁰² 510 U.S. 569 (1994) at 581.

¹⁰³ 510 U.S. 569 (1994) at 588.

¹⁰⁴ 60 U.S.P.Q. 2d 1225 (11th Cir. 2001).

the Wind”¹⁰⁵; consonant with the goals of parody, the defendant “conscripted elements from *Gone With the Wind* to make war against it.”¹⁰⁶.

US courts have had to assess defendants submissions that their parodies as fair use should not amount to copyright infringement on a number of occasions and on diverse facts. In *Leibovitz v. Paramount Pictures Corp.*¹⁰⁷, the defendant superimposed the head of a smirking man on the plaintiff’s photograph of a pregnant actress and used the picture as a motion picture advertisement. The court held fair use on the basis that the defendant’s picture constituted a parody. In *Dr. Seuss Enterprises v. Penguin Books USA Inc. and another.*¹⁰⁸, the defendants used the image of character “Cat in the Hat” in the plaintiff’s copyright work in a book about the O.J. Simpson trial. The court held that the work did not constitute a parody as it did not, in any way, criticise the plaintiff’s work.

On the facts of *The Historical Novel* case, it could be argued that, given the flexibility applied by US courts, it is likely that B could succeed in claiming that his work constitutes a permissible parody, provided that the courts do not find that he has copied A’s work more than what is necessary for a parody. In addition, the fact that his novel does not have a humorous effect should not negate a finding of fair use parody. B could rely on the judgement of *SunTrust Bank v. Houghton Mifflin Co.*¹⁰⁹ to argue that it is permissible, in this context, for his work to criticise A’s work instead. In conclusion, on a balance of probabilities, B could succeed in a fair use parody defence.

Having discussed the possibilities of B relying on current legislative defences as a means of accommodating his right of free speech and the courts potential approach to such claims, the following part will examine the courts attitude towards claims of free speech in copyright infringement cases¹¹⁰.

¹⁰⁵ 60 U.S.P.Q. 2d 1225 (11th Cir. 2001) at 1269.

¹⁰⁶ 60 U.S.P.Q. 2d 1225 (11th Cir. 2001) at 1271.

¹⁰⁷ 41 U.S.P.Q. 2d 1598 (S.D.N.Y. 1996), *aff’d*, 137 F.3d 109 (2^d Cir. 1998).

¹⁰⁸ 109 F.3d 1394, 42 U.S.P.Q. 2d 1184 (9th Cir. 1997).

¹⁰⁹ 60 U.S.P.Q. 2d 1225 (11th Cir. 2001).

¹¹⁰ Important works in this field include Tushnet, R., “Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It” (2004) 109 Yale L. J. 101; Baker, C.E., “First Amendment Limits on Copyright?” (2002) 55 Vanderbilt L. Rev. 891; Eisgruber,

On the facts of *The Historical Novel* case, B could invoke his free speech right under the First Amendment to the US Constitution¹¹¹ as a defence to A's claim of copyright infringement.

In the 1960s, a number of cases drew attention to the relationship of copyright and free speech. In *Rosemont Enterprises, Inc. v. Random House, Inc.*¹¹², the plaintiff, Rosemont Enterprises (a company controlled by Howard Hughes), brought an action for copyright infringement against the defendant on the ground that his book, a biography of Howard Hughes, infringed the copyright they owned in a series of articles about Hughes published in a magazine. The Second Circuit reversed a preliminary injunction against publication arguing that the plaintiff had failed to prove a strong infringement claim, while the defendant had a strong fair use defence. The court further held that copyright should not be used to interfere with the right of the public to be informed about matters of general interest.

In 1968, the case of *Time, Inc. v. Bernard Geis Associates*¹¹³ came before the courts. This case is considered by some scholars to be the case most responsible for firing the debate over the First Amendment complications of federal copyright law¹¹⁴. The case involved the use of sketches based on frames from the famous amateur film of the assassination of President John F. Kennedy. The defendants argued as affirmative defences that "the book [was] protected by the First

C.L., "Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law" (2003) 2 J. Telecommunications & High Technology L. 17; Denicola, R.C., "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression" (1979) 67 Cal. L. Rev. 283; Goldstein, P., "Copyright and the First Amendment" (1970) 70 Colum. L. Rev. 983; Lessig, L., "Copyright's First Amendment" (2001) 48 UCLA L. Rev. 1057; Netanel, N.W., "Market Hierarchy and Copyright in our System of Free Expression" (2000) 53 Vanderbilt L. Rev. 1879; Patterson, L.R., "Free Speech, Copyright, and Fair Use" (1987) Vanderbilt L. Rev. 1; Rubinfeld, J., "The Freedom of Imagination: Copyright's Constitutionality" (2002) 112 Yale L. J. 1; Yen, A.C., "A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'" (1989) 38 Emory L. J. 393.

¹¹¹ For a discussion of the Constitutional Clause and relevant case law determining its scope, see para. 2.4.3.

¹¹² 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 395 U.S. 1009 (1967).

¹¹³ 293 F. Supp.130 (S.D.N.Y. 1968).

¹¹⁴ See, Fraser, S., "The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet" (1998) 16 *Cardozo Arts & Ent. L. J.* 1, at 23.

Amendment and on that account an injunction [could not be] issued”¹¹⁵ and, alternatively, that their copying should qualify as fair use. At the time the case was decided, the fair use defence was still at the stage of a legislative proposal for codification. Thus the case did constitute an important jurisprudential development; the judicially created fair use exception to copyright weighed in favour of the defendant¹¹⁶.

Following these precedents, the argument that free speech should, to some extent, limit copyright law was raised in numerous cases. However, courts systematically rejected First Amendment claims on various grounds¹¹⁷.

The apparently categorical rejection of the First Amendment came in 1985 in the case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*¹¹⁸. The case involved the unauthorised publication in the *Nation* news magazine of three hundred words of a forthcoming autobiography of President Gerald Ford entitled “A Time to Heal”

¹¹⁵ 293 F. Supp. 130 (S.D.N.Y. 1968) at 131-32.

¹¹⁶ Professor Nimmer criticised Judge Wyatt’s “short shrift” consideration of the fourth fair use factor, namely the effect of the use upon the potential market for or value of the copyrighted work. See, Fraser, S., “The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet” (1998) 16 *Cardozo Arts & Ent. Law. J.* 1, at 27; Nimmer, M.B., “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) *UCLA L. Rev.* 1180, at 1201.

¹¹⁷ See, *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415 (S.D.N.Y. 1971); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977) at 1170 (held that an idea-expression dichotomy accommodates First Amendment concerns); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters*, 600 F.2d 1184 (5th Cir. 1979) at 1187 (“the judgment of the Constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment”); *Iowa State University Research Foundation, Inc. v. American Broadcasting Company, Inc.*, 621 F.2d 57 (2d Cir. 1980); *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095 (2d Cir. 1982) at 1099 (“No circuit that has considered the question ... has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the ‘fair use’ doctrine”); *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983); *Pacific and Southern Company, Inc. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), *rehearing denied*, 749 F.2d 733 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1984). For further analysis, see Birnhack, M., “Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act” (2003) 14(2) *Ent. L. Rev.* 24; Birnhack, M., “The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up” (2003) 43 *Idea: J. of Law & Tech.* 233; Barendt, E., “Copyright and Free Speech Theory” in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005).

¹¹⁸ 471 U.S. 539 (1985).

(nearly two hundred thousand words long). The court acknowledged that “Nowhere could the need to construe the concept of copyrightability in accord with First Amendment freedoms be more important than in the instant case. Here we are presented with an article describing political events of major significance, involving a former President of the United States. The paraphrasings concern the very essence of news and of history. In such works, courts have carefully confined that troublesome concept ‘expression’ to its barest elements – the ordering and choice of the words themselves”¹¹⁹. It went on to examine several internal copyright safety valves, such as the principle of idea/expression dichotomy, under section 102(b) of the 1976 Copyright Act¹²⁰ and fair use under section 107 of the Act and concluded that the fair use doctrine should not be expanded since the First Amendment protections are already embodied in the “Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”¹²¹. The court’s approach to the relationship between copyright and free speech is summarised in Justice O’Connor’s statement that “In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”¹²².

After *Harper & Row*¹²³ followed a period where the discussion of the First Amendment versus copyright issue had seemingly faded. That changed in the mid-1990s when attention was again turned to the expanded nature of copyright and increasing calls for First Amendment restraints¹²⁴. A number of cases came before

¹¹⁹ 471 U.S. 539, 544 (1985).

¹²⁰ “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work”.

¹²¹ 471 U.S. 539, 560 (1985).

¹²² 471 U.S. 539, 559 (1985).

¹²³ For commentary of the case, see Morrill, S.S., “*Harper & Row, Publishers v. Nation Enterprises*: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests” (1984) 79 NW. U. L. Rev. 587; Shipley, D.E., “Conflicts Between Copyright and the First Amendment after *Harper & Row, Publishers v. Nation Enterprises*” (1987) 1986 B.Y.U.L. Rev. 983.

¹²⁴ It has been put forward that the Congress’s decision to extend copyright protection for existing works combined with the new digital rights afforded to authors under the Digital Millennium Copyright Act have contributed to too much power being vested in authors. See,

the courts, whose approach in this area has not, on its surface, been wholly consistent. The Eleventh Circuit's decision in *SunTrust Bank v. Houghton Mifflin Co.*¹²⁵, presents an example of the approach that First Amendment principles must animate the understanding and application of copyright law. The court, making a finding of fair use parody, "invoked the First Amendment as a lodestar for interpreting copyright law"¹²⁶. The court stated that the fair use privilege in particular has "constitutional significance as a guarantor to access and use for First Amendment purposes"¹²⁷ and, in examining this limitation "we must remain cognizant of the First Amendment protections interwoven into copyright law"¹²⁸. The court concluded that "the issuance of the injunction [by the lower courts] was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech because the public had not had access to [the defendant's] ideas or viewpoint in the form of expression that she chose"¹²⁹.

In *Mattel, Inc. v. Walking Mountain Prods.*¹³⁰, artist Tom Forsythe used Barbie dolls in a series of photos¹³¹ as a commentary on "America's culture of consumption and conformism". Mattel sued for copyright infringement. The defendant claimed that his work should qualify as fair use parody. The court, dismissing Mattel's action, held that:

"Having balanced the four section 107 fair use factors, we hold that Forsythe's work constitutes fair use under section 107's exception. His work is a parody of Barbie and highly transformative. The amount of Mattel's figure that he used was justified. His infringement had no

Netanel, N.W., "Copyright and a Democratic Civil Society" (1996) 106 Yale L. J. 283; Netanel, N.W., "Locating Copyright Within the First Amendment Skein" (2001) 54 Stan. L. Rev. 1; Elkin-Koren, N., "Its All About Control: Rethinking Copyright in the New Information Landscape" in *The Commodification of Information* (Elkin-Koren, N. and Netanel, N.W. (eds.), Kluwer, 2002).

¹²⁵ 268 F.3d 1257 (US Ct of Apps (11th Cir.) 2001). The facts of this case have already been discussed in this section.

¹²⁶ Netanel, N.W., "Copyright and the First Amendment: What *Eldred* Misses – And Portends" in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005) at 148.

¹²⁷ 268 F.3d 1257, 1260 (US Ct of Apps (11th Cir.) 2001).

¹²⁸ 268 F.3d 1257, 1265 (US Ct of Apps (11th Cir.) 2001).

¹²⁹ 268 F.3d 1257, 1277 (US Ct of Apps (11th Cir.) 2001).

¹³⁰ 353 F.3d 792 (9th Cir. 2003).

¹³¹ In the photos concerned, Barbie dolls were juxtaposed against vintage kitchen appliances in threatening poses.

discernable impact on Mattel's market for derivative uses. Finally, the benefits to the public in allowing such use – allowing artistic freedom and expression and criticism of a cultural icon – are great”.

Even though the court did not base its decision on purely First Amendment considerations, they were evidently weighed in the defendant's favour¹³².

In January 2003, the Supreme Court laid down its view on the relationship between copyright and free speech in the case of *Eldred v. Ashcroft*¹³³. Its facts are unique in this context, as the free speech claim did not arise as a defence to a particular copyright infringement claim but as a primary First Amendment challenge to new copyright legislation, the Sony Bono Copyright Term Extension Act of 1998¹³⁴. The court, rejecting Eldred's challenge, held that:

“The First Amendment securely protects the freedom to make – or decline to make – one's own speech. The opinion of [the lower] court bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them.”

¹³² For cases where courts have taken a similar approach as in *SunTrust Bank*, see *MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc.*, 70 U.S.P.Q. 2d 1046 (S.D.N.Y. 2004) (parody within the context of political campaign held to be fair use); *American Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682 (N.D. Ohio 2002) (defendant produced commercial website aimed against the plaintiff, taking off on the latter's Duck ad campaign; the subject ads were validated by the court although they were not parodies); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315 (S.D.N.Y. 2002) (Mattel lost the action for copyright infringement it brought against the defendant for depicting Barbie “Lederhosen-style Bavarian bondage dress and helmet in rubber with PVC-mask and waspie”). Cf. cases that have followed the view that copyright requires no external First Amendment scrutiny, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (US Ct of Apps (9th Cir.) 2001); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (US Ct of Apps (9th Cir.) 2000); *LA Times v. Free Republic*, 54 U.S.P.Q. 2d (BNA) 1453 (CD Cal. 2000); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *Eldred v. Reno*, 74 F. Supp. 2d 1 (DDC 1999).

¹³³ 537 U.S. 186 (2003).

¹³⁴ The plaintiff brought a legal action to challenge the CTEA on the ground that it conflicted with the US Constitution.

It concluded that “when Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary”¹³⁵. The court, echoing the earlier *Harper & Row* decision, stated that “The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles”¹³⁶. However, rejecting copyright’s categorical immunity from First Amendment scrutiny, the court did recognise that, in principle at least, copyright does implicate the First Amendment. It could be argued that this case can hardly be characterised as a victory for the First Amendment. Professor Netanel¹³⁷ observed that, while the court’s decision stops short of the lower court’s “blanket rejection of any cognizable First Amendment interest in copying or building upon others’ copyrighted works, it runs squarely against established First Amendment precedent and wholly mischaracterizes the First Amendment values that copyright’s continuing expansion lays bare”¹³⁸.

Having examined the relevant case law concerning copyright vis-à-vis First Amendment concerns, it could be argued that if, on the facts of *The Historical Novel* case, B were to invoke his constitutional right of free speech as a defence *per se* to copyright infringement, it is unlikely that courts would uphold such a free-standing argument. *Eldred* demonstrated the courts unwillingness to develop a wholly new and expanded premise based on the First Amendment rights to restrict an author’s copyright.

Thus the question could be posed of where this leaves a party’s free speech right. US jurisprudence arguably reveals a consistent approach of the courts to First Amendment concerns, even though judicial decisions do appear, at first glance, to be diverse. Although courts are prepared to recognise the importance of free speech, they seem inclined to accommodate it within the framework of safety valves

¹³⁵ 537 U.S. 186, 221 (2003).

¹³⁶ 537 U.S. 186, 228 (1985).

¹³⁷ Netanel, N.W., “Copyright and the First Amendment: What *Eldred* Misses – And Portends” in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005) at 137.

¹³⁸ For extensive analysis and commentary on the *Eldred* decision, see Volokh, E., “Freedom of Speech and Intellectual Property: Some Thoughts after *Eldred*,” 44 *Liquomart*, and *Bartnicki*” (2003) 40 *Houston L. Rev.* 697; Samuelson, P., “The Constitutional Law of Intellectual Property after *Eldred v. Ashcroft*” (2003) *J. Copyright Soc’y* 547.

to copyright already in place as opposed to recognise it as a limitation to copyright in its own right.

Courts do not appear willing to depart from the present limitations context and extend it. Nevertheless, they are prepared to acknowledge that, in principle at least, First Amendment concerns underlie their assessment of cases and ultimately their decisions. It could be argued that a defendant, in similar circumstances to those of B in the present case, is more likely to succeed in a free speech claim under fair use rather than under the Constitutional Clause. It is thought-provoking that even though US courts take a liberal and flexible approach to fair use, partly reflecting First Amendment considerations, they are not prepared as yet to give free speech a more concrete place within copyright law.

It is thus submitted that there can be situations of potential conflict between the two sets of rights despite the courts efforts to mask them under their broad interpretation of fair use and other limitations to copyright law.

4.5.4 FRANCE

4.5.4.1 REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION

Article L.122-1 of the French Intellectual Property Code provides that “the right of exploitation belonging to the author shall comprise the right of performance¹³⁹ and the right of reproduction”. The scope of the right of reproduction is defined in article L.122-3 as consisting “in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way” and “may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording”.

Against this evidently wide ambit of the reproduction right¹⁴⁰, the Code sets out a list of limitations which includes private and gratuitous performances within the family

¹³⁹ The author's right of performance is defined in articles L.122-2, L.122-2-1 and L.122-2-2. This right is not examined in the context of the present analysis.

¹⁴⁰ For a more detailed examination of the right and its scope, see Sterling at pp. 399-400.

circle¹⁴¹, copies or reproductions for the private use of the copier¹⁴², analyses and short quotations justified by the critical, polemic, educational or informatory nature of the work in which they are incorporated, press reviews, dissemination of public speeches through the press or by telediffusion as current news (under the condition that the name of the author and the source are clearly stated)¹⁴³, and parody, pastiche and caricature (provided that the rules of the genre are observed)¹⁴⁴.

On the facts of *The Historical Novel* case¹⁴⁵, A will claim that B's novel infringes the right of reproduction in his work by copying parts of his novel and making use of some of his plots and scenes. Under the provisions of the French Intellectual Property Code, B will argue that the publication of his novel is a permitted act justified either as a work of a critical and informatory nature¹⁴⁶ or as a parody¹⁴⁷. As far as the first ground is concerned, it is uncertain whether courts would decide that, on the facts of the case, the quotation defence is applicable. French jurisprudence has allowed the transportation of characters¹⁴⁸ and plots¹⁴⁹ from an original work to a new one. Thus, they might find B's unauthorised use of A's plots and scenes permissible. However, the fact that B has also copied parts of the original work without any modifications is likely to put him in a disadvantageous position¹⁵⁰. Courts would only allow such an act if the sections borrowed did not amount to a

¹⁴¹ French Intellectual property Code 1992, article L.122-5-1.

¹⁴² French Intellectual Property Code 1992, article L.122-5-2.

¹⁴³ French Intellectual Property Code 1992, article L.122-5-3.

¹⁴⁴ French Intellectual Property Code 1992, article L.122-5(4)..

For a discussion concerning the issue of creating other "exceptions" that are not based on any statutory text, see Geiger, C., "Creating Copyright Limitations Without Legal Basis: The 'Buren' Decision, a Liberation?" (2005) 36(7) I.I.C. 842.

¹⁴⁵ The facts of this hypothetical case are set out in para. 4.2.

¹⁴⁶ Under article L.122-5(4).

¹⁴⁷ Under article L.122-5-3.

¹⁴⁸ *Delorme v. Clavier*, TGI Nanterre, March 1, 1996, (1996) 167 R.I.D.A. 180 (transplanting of a character amounted to use of unprotectable idea).

¹⁴⁹ *Deforge v. Trust Co. Bank (La Bicyclette Bleu)*, Cass. 1, Civ., February 4, 1992, (1992) 152 R.I.D.A. 196; C.A. Versailles, December 15, 1993, (1994) 160 R.I.D.A. 255 (analysis of plot intrigue, characters and dramatic progression amounted to no infringement by literary reproduction); *Garnier v. Rochette*, C.A. Paris, 4e Ch., February 21, 1996, (1996) 169 R.I.D.A. 383 (transplanting of scenario did not constitute copyright infringement).

¹⁵⁰ *J. L' Hoir v. Hatje Cantz Verlag* – RG 03/12669, TGI Paris, 3 Ch. Sect., September 14, 2004 (A photographer brought an action for infringement of his economic rights against a German firm that had published a book containing three of his photographs, without his consent. The court held that the photographs were original works enjoying copyright protection as "the choice of the composition of the pictures, the framing and the lighting confers on the photographs their own original, aesthetic appearance reflecting the stamp of their author's personality". Copyright infringement established.).

substantial part of A's work and this, on a balance of probabilities, appears unlikely – courts are generally unwilling to excuse use of a work without its author's consent when copying of the form of the expression is involved¹⁵¹ and there is substantial similarity between the two works.

Alternatively, B could claim that his novel constitutes a parody under article L.122-5(4), and thus, does not infringe A's reproduction right. For this legal argument to succeed, the court must be satisfied that there is enough proximity between the two works so that the public can recognise that the reference is to the first work but, at the same time, recognise that the second work is separate from the first. In addition, the second work must have a humorous or satirical effect¹⁵² – "It is essential that the public to whom the parody is presented can understand that it is a parody. The public will not realise this unless the work presented to it is such as to prompt a connection, in its mind, between the parody and the parodied work"¹⁵³. In this context, the Paris TGI stated that "parody pre-supposes the intention of amusing people without being harmful"¹⁵⁴. Despite the existence of these general pre-requisites, by referring to the "rules of the genre"¹⁵⁵ in its definition of the parody exception¹⁵⁶, the French Intellectual Property Code gives the courts "more room to manoeuvre" and a "very general standard"¹⁵⁷. In 2000, the Paris TGI¹⁵⁸ followed the approach of broad interpretation of the "rules of the genre" stating that "... they thus adapt to the parodist's intention from the moment that it is fair and useful"¹⁵⁹. Here,

¹⁵¹ See, Sterling at pp. 507-9.

¹⁵² *"Phillip Morris"*, C.A. Versailles, March 17, 1994, (1995) 164 R.I.D.A. 350. Also, see Françon, A., "Questions de Droit d' Auteur Relatives aux Parodies et Productions Similaires" (1988) *Copyright* 302.

¹⁵³ Françon, A., "Questions de Droit d' Auteur Relatives aux Parodies et Productions Similaires" (1988) *Copyright* 302.

¹⁵⁴ *SNC Prisma Presse and EURL Femme v. Monsieur V. and Association Apodeline*, TGI Paris, February 13, 2001.

¹⁵⁵ For a discussion of the courts interpretation of "the rules of the genre" over the years, see Spitz, B., "Droit D' Auteur Copyright et Parodie, ou le Mythe de l' Usage Loyal" (2005) 204 R.I.D.A. 54, at 84-86.

¹⁵⁶ French Intellectual Property Code 1992, article L.122-5(4).

¹⁵⁷ See, Spitz, B., "Droit D'Auteur Copyright et Parodie, Ou Le Mythe de L'Usage Loyal" (2005) 204 R.I.D.A. 54, at 64.

¹⁵⁸ *BMG Music Pub., Laurent Boutonnat, Jean-Claude Dequeant and Universal Music Pub. v. Lancelot Films*, TGI Paris, November 29, 2000, (2001) 189 R.I.D.A. 377 (A song by Mylène Farmer caricatured in the film "Presque Rien" constituted a parody and did not infringe copyright.).

¹⁵⁹ *Sté Sebdo and Jacques Faizant v. Editions Enoch*, C.A. Paris, May 11, 1993, (1993) 157 R.I.D.A. 340.

the travesty was fair and useful because, as the Court noted, it was not intended to ridicule the original work but rather to make the audience smile and served to depict a parenthesis, a moment of insouciance and joy in a serious film". It is now generally accepted that the courts are required to determine on a case-by-case basis the purpose of a parody - which can include a tribute or an artistic exercise – and whether that purpose is fair and useful. Thus, a French court, in deciding this case, will examine whether B's novel fulfils the above-mentioned conditions. In addition, B's novel will have to possess a level of distinctiveness and novelty that clearly separates it from A's work. In this framework, the following statements of the Paris TGI, in cases involving parodies, are of significance: "There is parody only to the extent that the author obtains a caricatured effect that is completely alien to the original work, thus ruling out any risk of confusion between the two compositions"¹⁶⁰; "As parody necessarily implies borrowing, it matters little that the parodist reproduces material from the first work as long as he or she shows originality, providing the work with his or her personal touch"¹⁶¹. Following these precedents it is likely that the court will reach the conclusion that B's work constitutes a parody¹⁶².

Apart from the defences already discussed and which are provided under the French Intellectual Property Code, B could also invoke his right of freedom of expression in order to justify the unauthorised use of A's work. The balancing of copyright and freedom of expression is a legal area that has not yet fully developed in France. There appears to be very limited case law to date that involves infringement of an author's reproduction right and another party's freedom of expression. Nevertheless, there are some important cases that involve freedom of expression in another area of intellectual property, namely trade mark law. It is therefore suggested that a critical analysis of these cases can be employed as a

¹⁶⁰ *SARL Ed. Prod. Musicales du Pactole et al. v. Sté Ed. Arpège*, TGI Paris, January 9, 1970, RTD com. 1972, 383 (parodist merely re-used in a burlesque manner a well-known song that was already burlesque. That was held to amount to plagiarism of the original song's humour and thus, to infringe copyright.).

¹⁶¹ *Charles Schultz and United Syndicate Inc. v. Editions Albin Michel, Marion Vidal*, TGI Paris, January 19, 1977, (1977) 92 R.I.D.A. 167.

¹⁶² For a detailed examination of the treatment of parodies in France and the common law copyright system, see Spitz, B., "Droit D' Auteur Copyright et Parodie, ou le Mythe de l' Usage Loyal" (2005) 204 R.I.D.A. 54.

tool for forming a view of the way French courts treat freedom of expression and the weight they attach to this right vis-à-vis intellectual property rights¹⁶³.

In *Fabris v. Sté France 2*¹⁶⁴, a case concerning author's right, a national broadcasting company showed twelve paintings – protected by copyright – in a two-minute news item concerning a Utrillo exhibition. The Utrillo estate brought a claim of copyright infringement against the broadcasting and demanded compensation. The company relied on Article 10 of the ECHR and argued that the right of the public to be informed of cultural events predominated the interests of the copyright owner. This reasoning was upheld by the Paris Court of First Instance¹⁶⁵. However, the court's decision was reversed by the Court of Appeal which held that the exception for incidental use of works under the French Intellectual Property Code implicitly embraces the right of freedom of expression; thus, a healthy balance between the two rights is already in place in the legislation. This ruling was upheld by the French Supreme Court which stated that "the right of the public to information and culture" cannot justify by-passing the consent of the copyright owner.

A similar case concerning author's right, *France 2 v. France*¹⁶⁶, before the Cour de Cassation and then the European Commission of Human Rights, involved a television news broadcast by a broadcasting company (France 2), in which it displayed the famous frescos of Edouard Vuillard at the theatre on the Champs Elysées. The visual arts collecting society SPADEM, representing the Vuillard estate, demanded compensation. The Cour de Cassation held that the broadcasting company could not rely on the statutory defence of briefly quoting existing works for informational purposes¹⁶⁷ – communicating an entire work to the public amounts to more than a "brief quotation" – and awarded SPADEM compensation. On appeal

¹⁶³ For a critical analysis of these cases, see Geiger, C., "Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?" (2004) 35(3) I.I.C. 268.

¹⁶⁴ C.A. Paris, 4th Ch., May 30, 2001, (2002) I.I.C. 995.

¹⁶⁵ Court of First Instance, Paris, February 23, 1999: (2000) R.I.D.A. 374. For a discussion of the underlying issues in this case, see Strowel, A. and Tulkens, F., "Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access", in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005) at p.306.

¹⁶⁶ ECommHR, January 15, 1997, case 30262/96, *Informatierecht*, 1999, at 115.

¹⁶⁷ French Intellectual Property Code, article L.111-1.

before the European Commission, France 2 invoked freedom of expression under Article 10 of the ECHR. The Commission did not uphold the argument, and effectively re-affirmed the French court's decision, albeit reducing SPADEM's claim to paying royalties. It should be noted that even though the Commission acknowledged that, in principle, copyright can restrict free expression and information, as protected under Article 10, it stated that it is not normally for the organs of the Convention to decide, in the context of Article 10(2), potential conflicts between the right to freely communicate opinions and information, and the interests of the authors of the works communicated¹⁶⁸.

Within the framework of trade mark law, three recent cases are considered to be representative of the stance of French courts towards freedom of expression. In the *Danone* case¹⁶⁹, the Court of Appeal held that the constitutional right of freedom of expression of a group of activists who created a website to boycott Danone's products prevailed over the trade mark rights of Danone since Danone's rights were respected and its products had not been denigrated.

Similarly, the Paris Court of First Instance ruled in favour of freedom of expression in the case of *Esso v. Greenpeace*¹⁷⁰. On the facts of the case, the oil company Esso brought a claim against Greenpeace on the grounds that its website undermined Esso's environmental policy by depicting its logo as E\$\$O and using the slogan STOP E\$\$O. the court held that Greenpeace's actions amounted to a controversial debate outside the course of business and did not cause confusion in the mind of the public. They thus remained within the ambit of freedom of expression and did not violate Esso's trade mark rights. It has been argued that this case should not necessarily be viewed as an absolute victory for freedom of expression, as essentially the court did not exercise an extensive balancing act of the two rights; it effectively ruled that Esso's trade mark rights had not been

¹⁶⁸ See, Hugenholtz, P. B., "Copyright and Freedom of Expression in Europe" in *The Commodification of Information* (Elkin-Koren, N., and Netanel, N. W. (eds.), Kluwer, 2002).

¹⁶⁹ C.A. Paris, April 30, 2003, *Ubiquité-Rev dr techn inf* [2003/17] 81.

¹⁷⁰ TGI Paris, January 30, 2004.

infringed in the first place – there was no likelihood of confusion among the public and neither had Esso's products or services been denigrated¹⁷¹.

Lastly, in the case of *Areva v. Greenpeace*¹⁷², the Paris Court of First Instance, unlike in the case of *Esso v. Greenpeace*¹⁷³, upheld a finding of trade mark infringement. On the facts of the case, Greenpeace posted certain comments about Areva – a company specialising in the treatment of nuclear waste – and a parody of Areva's logo on its website. The court held that even though there could be no confusion in the mind of the public, the activities of Greenpeace denigrated Areva's products and the parody of its logo – which could be interpreted as Areva spreading death – overstepped the boundaries of the right of freedom of expression without, at the same time, contributing to a public debate.

On the facts of *The Historical Novel* case, B could invoke his right of freedom of expression as a defence to A's claim of copyright infringement. Following the court decisions in relevant cases, it is difficult to reach an informed conclusion as to how the present circumstances would be assessed. Courts have not set out the limits of the respective rights to date, and neither have they commented on their interaction or potential conflicts. Thus, at this stage of the development of the jurisprudence, it is not clear what view the courts would take. It is however more likely that B's freedom of expression will be accommodated incidentally if it is held to fall within the scope of the parody defence, that it succeeding purely on its constitutional merits.

Having examined the relevant legislative provisions and case law, it could be suggested that the position of freedom of expression within the French system, cannot be characterised as substantial. The arguably wide scope of the statutory exceptions and defences to copyright might be viewed capable of embracing a party's freedom of expression right. However, the very nature of the right, as a constitutional provision and human right, does not appear to have been given

¹⁷¹ See Strowel, A. and Tulkens, F., "Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access", in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.)), Oxford University Press, 2005) at p.301.

¹⁷² TGI Paris, July 9, 2004.

¹⁷³ TGI Paris, January 30, 2004.

appropriate recognition to date by French jurisprudence. On the one hand, the number of cases in which the right has been invoked is limited. On the other, in those few cases where the right has been pleaded, the courts have demonstrated great hesitation in entering into any substantive balancing exercise of the rights and have not been willing to discuss their relationship or set out the boundaries of each of the rights – apart, in vague and general terms, from two instances.

It could thus be concluded that although a party's right of freedom of expression could potentially be safeguarded in an indirect way through existing copyright limitations, the lack of the courts acknowledgement of the right and its potential of conflicting with copyright can prove problematic. France has historically been one of the strongest advocates of author's rights in their intellectual creations. That could be a contributing factor to the courts hesitation in welcoming freedom of expression claims or limitations. Nevertheless, the recent trade mark law could be interpreted as a step forward towards a greater degree of endorsement of freedom of expression.

4.5.5 GERMANY

4.5.5.1 REPRODUCTION RIGHT AND FREEDOM OF EXPRESSION

Article 15(1) of the Author's Right and Related Rights Law 1965, provides that the author of a work shall have, among other rights, the exclusive right of reproduction which is defined as "the right to make copies of the work by whatever method and in whatever quantity"¹⁷⁴.

On the facts of *The Historical Novel* case¹⁷⁵, A would claim that B infringed the copyright in his novel by taking a substantial part of it and using it in his own work without A's consent. Since there is no rigid rule of numerical portion as to what constitutes a substantial part, A could also claim that even if the amount taken is proportionately small, copyright infringement can still be established on the basis of a qualitative test.

¹⁷⁴ Author's Right and Related Protection Rights Law 1965, article 16(1). Article 16(2) additionally provides that "reproduction of a work shall also be constituted by the fixation of the work on devices which permit the repeated communication of sequences of images or sounds (video or audio recording mediums) whether by recording a communication of the work on a video or audio medium or by transferring the work from one medium to another".

¹⁷⁵ The facts of this hypothetical case are set out in para. 4.2.

As a rule of thumb, B will have to rely on the provision under the 1965 Law that allows the free use of the work of another person¹⁷⁶ since none of the specific limitations listed in Chapter VI of the Law¹⁷⁷ appear to be applicable in the present case¹⁷⁸. It is not clear whether a German court would uphold the availability of this defence - free use of A's work as a parody - in B's case on a number of grounds. Firstly, claims of copyright infringement are judged on a case-by-case basis. Secondly, German courts decisions on parodies under the provisions of article 24 of the 1965 Law have been diverse. In the *Disney Parody* case¹⁷⁹, the Federal Supreme Court held that a parody would only fall in the ambit of the free use provision if the parts copied from the original work are necessary in creating the new parody work. However, the court rejected this criterion in the later case of *Mattscheibe*¹⁸⁰, where it stated that in cases where large parts of the original work are copied without any modifications, the courts shall adopt a restrictive approach on the availability of the parody defence. In 2003, ruling on the case of *Bundesadler*¹⁸¹, the Court held that for a new work to qualify as a parody, it must have sufficient inner distance from the original work, the amount of the copied parts from the original works being irrelevant. It appears that following this ruling, and the Court's approach in the *Alcolix*¹⁸² and *Asterix Parodies*¹⁸³ cases, the creation of a

¹⁷⁶ Author's Right and Related Protection Rights Law 1965, article 24(1). However, under article 24(2), the free use defence "shall not apply to the use of a musical work where a melody has been recognizably borrowed from the work and used as a basis for a new work". It has to be noted that the free use defence should not be confused with the fair use and fair dealing provisions in the common law system. The free use provision covers, for example, "the taking of features from a work and transforming these into an entirely new work, sufficiently distanced from the essential features of the used work". See, Sterling at pp. 448-50 and 521-25.

¹⁷⁷ A non-exhaustive list of available limitations to copyright infringement includes administration of justice and public safety (article 45), collections made for religious, school or instructional use (article 46), certain school broadcasts (article 47), public speeches (article 48) and newspaper articles and broadcast commentaries (article 49), visual and sound reporting on events of the day (article 50), quotation of individual works in independent scientific works and passages from works in independent works of language (article 51), public communication subject to conditions (article 52), reproduction for private and other personal uses (article 53), reproduction of works on public display (article 59).

¹⁷⁸ Note that the exception of quoting passages from individual works in independent works of language could be applicable. However, the fact that B has not only quoted parts of A's work but has also made use of some of the original scenes and plots might render this exception inapplicable on the present facts.

¹⁷⁹ BGH, (1971) G.R.U.R. 588.

¹⁸⁰ BGH, (2000) G.R.U.R. 703.

¹⁸¹ BGH, (2003) G.R.U.R. 956.

¹⁸² BGH, March 11, 1993 (1994) 25 I.I.C. 605.

¹⁸³ BGH, March 11, 1993 (1994) 25 I.I.C. 610.

new, independent work would now constitute the decisive factor in the applicability of the parody defence to cases of alleged copyright infringement¹⁸⁴.

It is likely that courts might not be satisfied that B's novel is an independent work with sufficient inner from A's work since B has made use of scenes and plots described by A in his novel. It is questionable whether B's work would be viewed, in the context of German jurisprudence, as an entirely new work, and thus, a permissible parody. The courts approach will depend to a large extent on the level of distinctiveness displayed in B's work – "As a rule ... the features borrowed from the protected older work [must] fade into the background in the new work in such a way that the use made of the older work by the more recent work appears merely as a stimulus to create the new and independent work"¹⁸⁵. Consequently, it could be suggested that, on the present facts, it is uncertain whether the court would allow B's defence.

For the purposes of the present analysis, it is important to examine German jurisprudence on the relationship between the reproduction right and freedom of expression and, whether B invoking his right of freedom of expression would influence or even shape the court's decision on the current facts. Freedom of expression is to be understood as defined in article 5 of the Basic Law¹⁸⁶ since the 1965 Law does not provide for a freedom of expression defence or limitation to copyright infringement.

Since the 1960s, there has been a number of cases where courts have taken a defendant's right of freedom of expression into account in considering instances of alleged copyright infringement. In 1962, the Berlin District Court allowed an unauthorised re-broadcasting of sections of a news program produced in the German Democratic Republic, by Berlin television on the grounds of article 5 of the Basic Law¹⁸⁷. Similarly, in 1977, the court allowed the broadcast of copyright protected photographs of members of the Baader-Meinhof terrorist group which had

¹⁸⁴ For a discussion of the *Alcolix* and *Asterix Parodies* cases, and the Federal Supreme Court definitions of "inner distance" and "independent", see para. 3.5.5.3.

¹⁸⁵ "*Gies Eagle*", BGH, March 20, 2003: (2004) 35 I.I.C. 984, at 986.

¹⁸⁶ For a detailed discussion of article 5 of the German Basic Law, see para. 2.4.5.

¹⁸⁷ *Maifeiern*, Landgericht Berlin, (1962) G.R.U.R. 1962.

previously been published in a critical news report¹⁸⁸. On this instance, the Court held that the importance of free political speech overrode any possible violation of copyright in the photographs.

In 1985, the Federal Supreme Court acknowledged that “under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding the express statutory limitations may be taken into consideration”¹⁸⁹ although, on the facts of the case, it ruled that the constitutional freedoms protected in article 5 could not provide a separate defence as they were already embraced in the provisions of the 1965 Law¹⁹⁰.

The Federal Supreme Court reached a similar conclusion in the *CB-Infobank* cases¹⁹¹, ruling that, on the facts before it, the interests of the copyright owner predominated over the public interest in accessing information. Nevertheless, despite this conclusion, the Court stressed that information as such is not protected under copyright legislation and thus, it should be freely provided and circulated.

In *Germania 3*¹⁹², the Federal Constitutional Court considered freedom of art under article 5 of the German Basic Law, in the context of an artistic author citing and criticising another author, under article 51 of the 1965 Law. Article 51(2) allows passages from a published work to be quoted in an independent work of language to the extent justified by the purpose. The fundamental constitutional question of the case was the extent of this freedom. The Court of Appeal granted an injunction holding that the citations taken from the original work did not support the defendant’s opinion but merely substituted the plaintiff author’s ideas. The defendant appealed against the decision invoking, among other rights, the right of freedom of art, research and teaching under article 5(3) of the German Basic Law.

¹⁸⁸ *Terroristenbild*, Landgericht Berlin, May 26, 1977: (1978) G.R.U.R. 108.

¹⁸⁹ *Lili Marlene*, BGH, March 7, 1985: (1987) G.R.U.R. 34.

¹⁹⁰ The case involved the unauthorised publication by a newspaper of the lyrics of the “Lili Marlene” song which featured in a forthcoming film about Lili Marlene’s life.

¹⁹¹ *CB-Infobank I*, BGH, January 16, 1997: (1997) G.R.U.R. 459 at 463; *CB-Infobank II*, January 16, 1997: (1997) G.R.U.R. 464 at 466.

¹⁹² BVerfGE, June 29, 2000: (2001) 2 G.R.U.R. 149, *Zeitschrift für Urheber – und Medienrecht*, 2000, 867. On the facts of the case, an author quoted in a chapter of his seventy five-page long play about four pages from another writer’s play without obtaining the consent of the latter author’s heirs. The case also involved claims of infringement of the author’s moral rights. These claims are discussed in para. 3.5.5.3.

The Federal Constitutional Court overturned the Court of Appeal's decision on the basis that the court had not adequately considered the influence of article 5(3) when interpreting article 51(2) of the 1965 Law. It held that, when considering the scope of a party's right to use quotations from another author's or artist's work, the right of freedom of art has the effect of broadening that party's right because of the internal connection between the author's or artist's original ideas and the artistic style of the new work containing the quoted extracts¹⁹³. The Court acknowledged that article 5(3) serves the purpose of protecting an artist from public encroachments¹⁹⁴ and of contributing to the framing of a free environment where authors can create and discuss art. It is for the courts to balance this right against the economic and other interests of the copyright owner, and define the boundaries of the respective rights for the benefit of the public¹⁹⁵. In exercising this balancing act, the Court held that, the interests of the public to make unauthorised use of the copyright owner's work in order to freely discuss art, outweigh the interests of the copyright owner provided that the encroachment in his rights is negligible and that there is no real threat of him suffering considerable economic disadvantages¹⁹⁶. In conclusion, the Court ruled that, in assessing infringement in this context, the judiciary must evaluate the new work produced as a whole and that it is acceptable for an author to use a combination of citations – even if these are extensive – from a work protected by copyright and his own writings in order to create a new work, provided that the citations or quotations are used as a functional part of his own ideas and appear to be part of his own separate artistic expression.

The Court's decision in *Germania 3*¹⁹⁷ appears to be supported by the earlier case of *Havemann*¹⁹⁸, where the Constitutional Court ruled that freedom of information, under article 5(1) of the Basic Law, outweighed the property interests of the copyright owner in his work, under articles 2 and 14 of the German Basic Law¹⁹⁹.

¹⁹³ At para. 22.

¹⁹⁴ At para. 18. The Court also stated that despite the wide scope of article 5(3), it does not confer an absolute right but one that can be restricted under certain circumstances.

¹⁹⁵ At paras. 19 and 23.

¹⁹⁶ At para. 24.

¹⁹⁷ BVerfGE, June 29, 2000: (2001) 2 G.R.U.R. 149, *Zeitschrift für Urheber – und Medienrecht*, 2000, 867.

¹⁹⁸ BVerfGE, 1BvR 1611/99, December 17, 1999.

¹⁹⁹ On the facts of the case, a company published a book which contained the appeal speech of a lawyer defending a critic of the former German Democratic Republic. The

The court held that, on the facts of the case, the right of freedom of information, safeguarded a forum for free discussion on an issue of public interest – the history of the former German Republic – and that the public's right to have access to information and opinions, outweigh the economic interests²⁰⁰ of the copyright owner²⁰¹.

In the more recent case of "*Gies Eagle*"²⁰², the Federal Supreme Court discussed the interaction between copyright and freedom of the press, under article 5(1) of the Basic Law. The case involved a parody in which a political news magazine used a parodied eagle sculpture²⁰³ as a picture heading for an article about misuse of taxation law by the State entitled "The 'Unserious State'". The plaintiff, the Bild-Kunst collecting society²⁰⁴, argued that the Gies Eagle was protected by copyright, and that its reproduction in the magazine constituted a restricted adaptation. The magazine claimed that the reproduction should be permitted as a means of expression of political discussion within the framework of the free use defence under article 24(1) of the 1965 Law and the right of freedom of the press under article 5(1) of the Basic Law. The court, dismissing the plaintiff's appeal, upheld that the reproduction of the Gies Eagle "is not covered by the author's exclusive rights but is permitted as a means of expression of political discussion within the framework of an unrestricted use within the meaning of Sec.24(1) of the Copyright Act ... [and] by the freedom of press (Art. 5(1), second sentence, of Basic Law)"²⁰⁵. Acknowledging the need to balance copyright with the constitutional freedoms guaranteed under article 5 of the Basic Law, the court commented that "if ... there is a greater public interest in the reproduction of a protected work, this may, under

published appeal was ten pages long. The lawyer brought a claim against the publishing company seeking an injunctive relief, on the basis that the unauthorised publication infringed his property rights (copyright) in the work. The Constitutional Court dismissed the appeal on other grounds, but upheld the interpretation and balance of the parties interests applied by the lower courts.

²⁰⁰ It should be noted that the court deemed the potential economic exploitation rights of the copyright owner to be limited. It is not clear whether the court would have reached the same conclusion if the author's potential pecuniary interests being compromised were greater.

²⁰¹ At paras. 5, 6 and 22.

²⁰² BGH, March 20, 2003: (2004) 35 I.I.C. 984.

²⁰³ The sculpture of the Eagle, created by Ludwig Gies in 1953, hung at the front of the German Federal Parliament in Bonn from 1955 until it was rebuilt.

²⁰⁴ The collecting society owned the copyright in the Eagle sculpture subject to a collecting agreement concluded with the heirs of Gies.

²⁰⁵ BGH, March 20, 2003: (2004) 35 I.I.C. 984, at 987.

certain circumstances, be taken into account in the interpretation of the powers to which the author is entitled, and in any event, in the interpretation of the limits to copyright, and may in the individual case mean that a narrow construction focused on the wording of the legislation may have to give way to a more generous interpretation that takes account of the general public's interest in information and use In any event, account must be taken of both the author's interests and the interests protected by the limits on copyright, which must be applied with appropriate weighting to the construction of the statutory provision"²⁰⁶.

Having examined the relevant German case law in this area and analysed the courts approach to cases of alleged infringement of the author's right of reproduction, it could be suggested that freedom of expression is becoming an increasingly important right in this context. Despite the fact that the right has been becoming more prominent only in recent years, courts appear willing to balance it against those of the copyright owner. It appears that German courts have not dismissed or undermined the importance of this constitutional freedom. In fact, in the majority of the cases where the right has been invoked, it has been held to override the author's pecuniary interests. Thus, on the facts of *The Historical Novel* case, it is probable that B could succeed if he raises his right of freedom of expression. Even if that claim does not succeed as such, it is almost certain that courts will have taken it into account and balanced it against A's interests, before reaching its verdict.

In conclusion, it could be argued that German case law provides evidence that there exist situations where freedom of expression and the exclusive right of reproduction can clash. Courts, in acknowledging that this is becoming a problematic area, are prepared to give judgements interpreting the rights relationship and setting their respective boundaries; it also appears that the parody exception is mostly viewed as a limitation in favour of free expression²⁰⁷.

²⁰⁶ BGH, March 20, 2003, (2004) 35 I.I.C. 984, at 986.

²⁰⁷ Guibault, L., "Limitations Found Outside Copyright Law" in ALAI Study Days Documents, Cambridge 1998, *The Boundaries of Copyright – Its Proper Limitations and Exceptions* (Australian Copyright Council, 1999), at p. 44.

It can thus be submitted that, in the context of German jurisprudence, there is no real potential of the right of freedom of expression to be seriously compromised or jeopardised. However, due to the relatively small number of decided cases and the consequent lack of concrete precedents, this conclusion cannot be held to be categorical.

4.6 SUMMARY

The relationship between the author's exclusive right of reproduction and another party's right of freedom of expression has developed at different stages in the various national legal systems. Judicial guidance and interpretation on the rights interaction has been developed in some countries more extensively than in others.

Different countries with different legal traditions afford different treatment to the law of copyright. Civil law author's right systems appear to attach greater importance to the author's personality and his intellectual creations. At the other end of the spectrum, common law countries seemingly attach more weight to the author's exploitation and pecuniary interests.

Freedom of expression, as a human and, at instances, constitutional right, has in general been legislatively defined and judicially interpreted in a more consistent manner on the national level. The fact that this right is less complicated in nature, and that it does not comprise a bundle of diverse sub-rights could be contributing elements to its more uniform interpretation and application. Freedom of expression is increasingly used as a right to be juxtaposed against the arguably strong rights of the copyright owner under some national laws.

Given the countries diverse approach to copyright and their differing rate of legal development, their response to calls for freedom of expression restraints on copyright is equally diverse. In general, jurisprudence on this subject in the majority of national laws has not fully developed. However, it appears that the pressure on the judiciary to halt the expanding nature of the bundle of rights that comprise copyright, as supported by technological development, and in particular, the pressure to bring it into line with the principle of freedom of expression is mounting. Although no national law has to date recognised freedom of expression *per se* as a

limitation to copyright, some national courts are more willing than others to validate the right's progressive prominence in this context.

Potential conflicts between the two rights have here been illustrated. These conflicts cannot necessarily be resolved or successfully accommodated within the traditional copyright framework. It is thus submitted that rendering freedom of expression a limitation to copyright could constitute a welcome introduction for legislature and judiciary alike, alleviating the current or potential problems of interpretation and balancing of the rights.

CHAPTER 5

Copyright Limitations and Exceptions in Conflict Resolution

5.1 GENERAL OVERVIEW

In general, courts have demonstrated a high degree of reluctance in acknowledging that situations exist that could give rise to conflicts between the protection afforded by copyright and the effective recognition of the human right of freedom of expression¹.

Having brought into light areas of potential conflict within the context of the relationship between an author's moral² and economic rights³ and freedom of expression, this Chapter examines the limitations⁴ that are in place to curtail

¹ See, *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415 (S.D.N.Y. 1971) at 422 ("Defendants First Amendment argument can be dismissed as flying in the face of established law"); *United States v. Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974) at 1267-68 ("We fail to see any protected First Amendment right or privilege to usurp the benefits" of the copyright owner); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) at 758, *cert. denied*, 439 U.S. 1132 (1979) ("[The] defendants [First Amendment] claim can be dismissed without a lengthy discussion"); *Schnapper v. Foley*, 471 F. Supp. 426 (D.D.C. 1979) at 428, *aff'd*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("It is well established that there is no conflict between the First Amendment and the copyright laws.").

² For an examination of areas of potential conflicts identified in the context of the relationship between the author's moral rights of paternity and integrity and another party's right of freedom of expression, see Chapter 3.

³ For an examination of areas of potential conflict identified in the context of the relationship between the author's economic right of reproduction and another party's right of freedom of expression, see Chapter 4.

⁴ The term "limitations" to copyright used throughout this Chapter is to be understood as encompassing the concepts of exceptions, restrictions, permitted acts (all three terms to be understood as exceptions to exploitation rights awarded to an author under copyright legislation), and limits to be understood as concepts that limit copyright without necessarily constituting express restrictions to an author's exclusive rights) to copyright, unless such other concepts are specifically used. International copyright Conventions and national legislative documents use several terms to describe permitted derogations from copyright, which "designate concepts of varying nature and thereby influence the interpretation of the respective provisions". For a discussion of the varying terminology of inherent and outer limitations to copyright laws in general, see Spoor, J.H., "General Aspects of Exceptions and Limitations to Copyright: General Report", in ALAI Study Days Documents, Cambridge

copyright expansion, as it may be argued, and which are most frequently cited in copyright jurisprudence and legislation. Courts have likewise employed these limitations, at times, to rationalize and substantiate decisions that copyright does not encroach upon another party's human right of freedom of expression.

The Chapter seeks to evaluate the validity and status of the argument that current limitations and exceptions to copyright are sufficient means of safeguarding a party's right of freedom of expression vis-à-vis the author's exclusive rights. It appears that this line of reasoning is more prevalent in the common law countries and, in particular, the United Kingdom and United States, as these countries legislations provide for extensive copyright limitations⁵.

On the other hand, the copyright culture in civil law countries, such as France and Germany, is different. Despite the fact that the national legislations afford limitations to copyright, they are more specific in nature and consequently narrower in scope. In addition, such countries primarily view a party's right of freedom of expression is primarily viewed as a constitutional right. Accordingly, judicial interpretation of cases involving potential conflicts between copyright and freedom of expression focuses on balancing two distinct sets of rights, as opposed to attempting to accommodate freedom of expression within the realms of copyright exceptions⁶.

1998, *The Boundaries of Copyright: Its Proper Limitations and Exceptions* (Australian Copyright Council, 1999) at p.29.

⁵ For an examination of judicial interpretation in the UK of cases involving potential conflicts between an author's reproduction right and another party's right of freedom of expression, see para. 4.5.2.1.

For an examination of judicial interpretation in the US of cases involving potential conflicts between an author's reproduction right and another party's right of freedom of expression, see para. 4.5.3.1.

Both of the above-mentioned paragraphs refer, in part, to the respective national courts willingness to accommodate freedom of expression arguments within the context of exceptions to copyright. It should be noted that such exceptions are not applicable to alleged infringement of an author's moral rights. Alternative judicial approaches to cases involving potential conflicts between an author's moral rights and freedom of expression are discussed in paras. 3.5.2 (UK approach) and 3.5.3 (US approach).

⁶ For an examination of judicial interpretation in France of cases involving potential conflicts between an author's reproduction right and another party's right of freedom of expression, see para. 4.5.4.1.

For an examination of judicial interpretation in Germany of cases involving potential conflicts between an author's reproduction right and another party's right of freedom of expression, see para. 4.5.5.1.

Overall, the Chapter will make reference to legislative provisions, relevant legal commentary and case law of the United Kingdom and United States. Respective issues within civil law countries will also be discussed.

The structure of the Chapter reflects the disparity among national laws and discusses the copyright exceptions of fair dealing and fair use, the public interest aspect, the principle of idea/expression dichotomy and the arguably limiting factor of restricted copyright duration. The Chapter's closing paragraph draws conclusions as to the current role of copyright limitations and exceptions within the context of the interaction of copyright and freedom of expression. It also questions whether such limitations do afford implied protection to freedom of expression and, most importantly, whether this is a proper avenue for safeguarding a universal human right.

5.2 THE FAIR DEALING AND FAIR USE EXCEPTIONS

The fair dealing defence is found in the copyright laws of the United Kingdom and Commonwealth countries⁷, while the fair use doctrine is present in the copyright law of the United States of America.

The defences were judicially created and developed⁸ and were not codified until 1911 in the UK and 1976 in the US. They appear to have emanated from public interest concerns; an attempt by the courts to balance the exclusive interests of the copyright owner against those of the general public who ultimately benefit from the creation and dissemination of works of authorship.

Cases involving alleged infringement of an author's moral rights and the application of specific exceptions in the context of such rights interaction with the right of freedom of expression, see paras. 3.5.4 (French approach) and 3.5.5 (German approach).

⁷ For the purposes of the thesis, fair dealing is analysed from the UK legal perspective. The respective statutory provisions of other Commonwealth countries are not hereby considered.

⁸ See Garnett, K., Davies, G. and Harbottle, G., *Copinger and Skone James on Copyright* (15th ed., Sweet & Maxwell, 2005), at pp. 481-82.

These exceptions are consistent with the provisions of international copyright instruments, such as the Berne Convention 1971⁹ and the TRIPS Agreement 1994¹⁰.

5.2.1 THE FAIR DEALING DEFENCE

The fair dealing defence is set out in section 30 of the CDPA 1988, and allows acts, otherwise infringing, to be carried out in relation to a work for the purposes of “non-commercial research and private study”¹¹, “criticism or review”¹² and “reporting current events”¹³. Over the years, courts have consistently observed that the primary objectives of this defence are the promotion of informed and critical debate on matters of social, artistic and political importance as well as the preservation of freedom of expression¹⁴. However, the relatively narrow scope of the fair dealing coupled with the courts varied approach to the invoking of the defence do pose a considerable challenge to the argument that freedom of expression constitutes an underlying justification for fair dealing.

⁹ The Berne Convention 1971 provides for a number of exceptions to the author's exclusive right of reproduction, including free use of a work “for the purpose of reporting current events” (Article 10*bis*(2)). Article 9(2) of the Convention is of particular importance as it sets out the so-called “three-step” test for the introduction of copyright exceptions in national laws. Article 9(2) states that any limitations or exceptions to the reproduction right must “not conflict with a normal exploitation of the work” nor “unreasonably prejudice the legitimate interests of the author”.

¹⁰ Article 13 of the TRIPS Agreement 1994 extends Article 9(2) of the Berne Convention 1971 to apply not merely to the reproduction right but to all authors rights.

¹¹ “Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement”, CDPA 1988, section 29(1). See, Senftleben, M., *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law* (Hugenholtz, P.B. (ed.), Kluwer Law International, 2004).

¹² “Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement”, CDPA 1988, section 30(1).

¹³ “Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided ... it is accompanied by a sufficient acknowledgement”, CDPA 1988, section 30(2). Note that “No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme”, CDPA 1988, section 30(3).

¹⁴ See, *Hubbard v. Vosper* [1972] Q.B. 84; *British Broadcasting Corp. v. British Satellite Broadcasting Ltd.* [1991] 2 All. E.R. 833; *Time Warner Entertainment Ltd. v. Channel Four Television Corp. plc*, [1994] E.M.L.R. 1.

Regarding the restricted ambit of the defence, two important points should be noted. Firstly, fair dealing is only applicable for the purposes set out in sections 29 and 30 of the CDPA 1988. Any activity that falls outside the definition of those terms will not be covered by the defence. Secondly, in order to rely on this defence, a defendant must, in certain cases, ensure compliance with two further requirements, namely that the work has been made available to the public¹⁵ and that a sufficient acknowledgement has been made¹⁶.

Regarding the courts interpretation of the defence, this at times has been restrictive as well. Fair dealing for the purpose of reporting current events has often been construed in a manner that has imposed limits on the meaning of “current events”. In other words, in such cases courts have read “current events” literally without necessarily taking into account the fact that past events might have a direct impact on current concerns and might need to be reported at a later time than at the time they actually occurred¹⁷. In *Associated Newspapers Group plc v. News Group Newspapers Ltd.*¹⁸, Walton J., dismissing the section 30(2) fair dealing defence, observed in relation to the requirement of current events that “although ... there is no requirement ... of necessity [within the statutory provision] ..., that at any rate is a good start ... [I]s it reasonably necessary to refer to these matters in order to deal with current events?”¹⁹. The *Ashdown* judgment also dealt with the issue of use of an existing work for reporting events which are not current. The Court commented

¹⁵ CDPA 1988, sections 30 and 30(1A).

¹⁶ CDPA 1988, section 30. For a criticism of the unnecessary technical restrictions posed by this requirement, see Laddie, H., “Copyright: Over-strength, Over-regulated, Over-rated?” (1996) E.I.P.R. 253.

¹⁷ See *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers* [1975] Q.B. 613 (publication of detailed effects of the drug thalidomide did not constitute fair use for the purpose of reporting current events because the drug had been withdrawn from the market twelve years previously); *Beggars Banquet Ltd. v. Carlton Television and Spidercom Ltd.* [1993] E.M.L.R. 349, at 365 (“whether events that took place in August 1992 can be said to have been ‘current’ in January 1993 would be for determination at trial”). For a more detailed discussion of this issue, see Griffiths, J., “Copyright Law and Censorship – The Impact of the Human Rights Act 1998” (1999) 4 *The Yearbook of Copyright and Media Law* 3, at 16-18.

¹⁸ [1986] R.P.C. 515. In this case, the plaintiff owned rights in letters sent by the Duke of Windsor to the Duchess of Windsor. The defendant obtained copies of the letters and published them without the plaintiff’s consent. The plaintiff brought an action for copyright infringement and the defendant relied on the fair dealing defence. (Note that when this case was heard before the courts, the CDPA 1988 had not yet been passed. Thus, the defendant relied on the predecessor of section 30(2), that is section 6(1) of the Copyright Act 1956.).

¹⁹ [1986] R.P.C. 515, at 519.

that “[I]t is possible to conceive of information of the greatest public interest relating not to a current event, but to a document produced in the past. We are not aware of any provision of the 1988 Act which would permit publication in such circumstances, unless the mere fact of publication, and any controversy created by the disclosure, is sufficient to make them ‘current events’. This will often be a ‘bootstraps’ argument of little merit, but on other occasions (such as disclosure by the Public Record Office under the 30-year rule) it may have a more solid basis”²⁰.

A further issue that has been the subject of much academic debate has been the definition of what is “fair”. Generally, courts, in answering this question, have taken into consideration a number of factors, including the proportion of the original work used by the defendant and the defendant’s motives for his actions. As far as the proportion of the original work used is concerned, it appears that, as a general rule of thumb, the longer the extract(s) taken, the less likely it is that fair dealing will be upheld. However, there have been instances where courts have ruled in favour of fair dealing even where the whole of the original work has been taken, the original work being short²¹.

The motives of the defendant are generally taken into account by the courts in reaching their conclusion²². It has been held that if a copyright work is deliberately used within the context of business competition, fair dealing is unlikely to be upheld²³. In *Associated Newspapers Group v. News Group Newspapers Ltd*²⁴, the

²⁰ [2002] Ch. 149, at 166-7.

²¹ See *British Oxygen v. Liquid Air Ltd.* [1925] Ch. 383; *Hubbard v. Vosper* [1972] 2 Q.B. 84, at 94 (“Suppose that there is on a tombstone in a churchyard an epitaph consisting of a dozen or of 20 words. A parishioner of the church thinks that this sort of epitaph is out of place on a tombstone. He writes a letter to the parish magazine setting out the words of the epitaph. Could it be suggested that the citation is so substantial, consisting of 100 per cent of the ‘work’ in question that it must necessarily be outside the scope of the fair dealing provision? To my mind it could not validly be so suggested”); *Beloff v. Pressdram* [1973] 1 All E.R. 241.

²² Note that some case law supports the proposition that when the work or part of the work used was of a confidential nature this would constitute a factor that can negate a finding of fair dealing. See *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241. However, in *Time Warner Entertainment Co. v. Channel Four Television Corporation plc* [1994] E.M.L.R. 1, at 17, Neill L.J. stated that “I do not intend to throw any doubt on the decision in the *Beloff* case itself, but it is my present view that criticism of a work already in the public domain which would otherwise constitute fair dealing for the purposes of section 30(1) would seldom if ever be rendered unfair because of the method by which the copyright material has been obtained”.

²³ *Weatherby v. International Horse Agency and Exchange Ltd.* [1910] 2 Ch. 297.

court concluded that the defendant's motive in publishing the letters in question was to "attract readers" and that did not constitute "fair" use of the letters²⁵.

Despite the restrictions placed on the interpretation of fair dealing by the courts, the Court of Appeal in *Ashdown v. Telegraph Group Ltd*²⁶ made it clear that fair dealing in works for the purpose of reporting current events, as set out in CDPA 1988, will often allow publication of the words used and thus provide the required protection to a defendant's right of freedom of expression. It also noted that the open-ended scope of the "fairness" requirement will normally "afford the court all the scope that it needs to reflect properly the public interest in freedom of expression and, in particular, the freedom of the press"²⁷. The court concluded that:

"The infringement of copyright constitutes interference with the 'peaceful enjoyment of possessions'. It is, furthermore, the interference with a right arising under a statute which confers rights recognised under international convention and harmonised under European law – see the Berne Conventions of 1886 and 1971 and EC Council Directive of 29 October 1993. There is thus no question but that restriction of the right of freedom of expression can be justified where necessary in a democratic society in order to protect copyright. The protection afforded to copyright under the 1988 Act is, however, itself subject to exceptions. Thus both the right of freedom of expression and copyright are qualified. This appeal raises the question of how the two rights fall to be balanced, when they are in conflict"²⁸.

In *Hubbard v. Vosper*²⁹, a case decided long before *Ashdown*, Lord Denning referred to the potential conflict that might arise between copyright and freedom of

²⁴ [[1986] R.P.C. 515.

²⁵ [1986] R.P.C. 515, at 518.

²⁶ [2002] Ch. 149.

²⁷ See, Garnett, K., "The Impact of the Human Rights Act 1988 on UK Copyright Law", in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005), at p. 183. For a more detailed discussion of the *Ashdown* case, see paras. 4.5.3.1 and 5.3.2.

²⁸ [2002] Ch. 149, at para. 28.

²⁹ [1972] 2 Q.B. 84. The defendant published a book containing long extracts from published and unpublished works of the founder of the Church of Scientology. The book was highly

expression and the role that statutory defences, such as fair dealing and the public interest serve in such instances, observing that:

“But here, although Mr Hubbard owns the copyright, nevertheless, Mr Vosper has a defence of fair dealing: and although Mr Hubbard may possess confidential information, nevertheless, Mr Vosper has a defence of public interest. These defences are such that he should be permitted to go ahead with the publication... So in [a] copyright action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the defendant, if he is right, is entitled to publish it: and the law will not intervene to suppress freedom of speech except when it is abused”³⁰.

5.2.2 THE FAIR USE DOCTRINE

The fair use doctrine developed in the nineteenth century as an equitable privilege³¹ and is now codified in section 107 of the 1976 Copyright Act³². Unlike the UK fair dealing provisions, fair use in the US is a more flexible defence. Use of a work is not confined to prescribed purposes. Thus any use of an existing work can be held to be non-infringing provided that it is fair. In addition, courts are given further guidance by a set of non-exclusive policy factors that they should take into account in reaching their decision³³.

critical of the Church of Scientology. The plaintiff brought an action for copyright infringement and breach of confidence. The defendant relied on fair dealing for the purpose of criticism and review and public interest for the respective infringement actions. The Court of Appeal allowed both defences. Note that if this case were to be brought before the courts today, the defendant would not have been able to rely on fair dealing regarding the plaintiff's original works because of the amendment to section 30(1) that now requires that the work must have been made available to the public.

³⁰ [1972] 2 Q.B. 84, at 96-7. this statement was made by Lord Denning and related to the grant of an interim injunction.

³¹ See, *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

³² The fair use provision under the 1976 Copyright Act as well as relevant case law is examined in greater detail in para. 4.5.3.1.

³³ Copyright Act 1976, section 107. For a more detailed discussion of the provisions of section 107 and relevant case law, see para. 4.5.3.1.

The debate regarding the potential conflict between copyright and free speech flared up in 1960s³⁴. There is a large body of case law which supports the proposition that fair use adequately accommodates First Amendment concerns³⁵. Such decisions conclude that given the restricting role of the fair use limitation, copyright does not require any external First Amendment scrutiny³⁶.

5.2.3 CONCLUSIONS

Fair dealing under the CDPA 1988 appears to be defined less flexibly than the equivalent fair use doctrine in the US. The use of the existing work must be made for one of the purposes set out in the Act, while, at the same time, as Lord Dennis indicated in *Hubbard v. Vosper*³⁷ "It is impossible to define what is 'fair dealing'. It must be a question of degree"³⁸.

It appears that, over the years, courts have expanded the application of the defence. However it is questionable whether such an expansion is satisfactory for the purposes of protecting freedom of expression. Although the courts are prepared to acknowledge that there might be situations of conflict between copyright and free expression, they have historically maintained that fair dealing, coupled with the

³⁴ See, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y.) at 67, *rev'd*, 366 F.2d 303 (2d Cir. 1966) at 311-13 (Lumbard and Hays, J.J., concurring), *cert. denied*, 385 U.S. 1009 (1967); *Public Affairs Associates, Inc. v. Rickover*, 268 F. Supp. 444 (D.D.C. 1967) at 446 and 456; *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) at 146.

³⁵ See, *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095 (2d Cir. 1982) at 1099 ("No Circuit that has considered the question ... has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine"); *Twin Peaks Prods., Inc. v. Publications International Ltd.*, 996 F.2d 1366 (2d Cir. 1993) at 1378 ("Except perhaps in an extraordinary case, 'the fair use doctrine encompasses all claims of first amendment in the copyright field'" (citing *New Era Publications International v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) at 584); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) at 74 ("[The Second Circuit] has repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine").

³⁶ See, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), at 574-78; *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *L.A. Times v. Free Republic*, 54 U.S.P.Q. 2d (BNA) 1453 (C.D. Cal. 2000); *Chi. Sch. Reform Bd. Of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000); *Southco, Inc. v. Kanebridge Corp.*, 53 U.S.P.Q. 2d (BNA) 1490 (E.D. Pa. 2000); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

³⁷ [1972] 2 Q.B. 84.

³⁸ [1972] 2 Q.B. 84, at 89.

other internal controls to copyright are sufficient for the resolution of any such conflicts.

Following recent case law and the introduction of the Information Society Directive 2001³⁹, it has been suggested⁴⁰ that the UK should take advantage of one of the exceptions in the Directive which is currently lacking from the 1988 Act, namely “use for the purpose of caricature, parody or pastiche”⁴¹ in order to provide strengthened protection to freedom of expression in situations that are currently not taken into consideration under the UK Act. If one could draw a conclusion from the experience of the French legal system, which expressly provides for such a defence, it might be said that the inclusion of this further exception within the UK law would add a higher degree of protection to free expression. However, if one were to judge from the fact that the UK chose not to take up that option it is questionable whether it will do so in the future.

Commentators have concluded that fair use is not an appropriate means of securing the effective protection of free speech. The statutory fair use provision requires courts to undertake a case-by-case analysis, taking into account a number of factors⁴² in order to reach their decision. This contributes to the open-ended nature of the limitation⁴³, which, in turn, exacerbates its inconsistent application. Netanel’s conclusion appears to give a succinct, yet accurate, overview of the fair use landscape at present, “In sum, if ever fair use secured First Amendment interests, today’s fair use doctrine provides no more than a bare, insubstantial trace of that protection”⁴⁴.

³⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁴⁰ See, Dworkin, G., “Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer’s Perspective”, in *Copyright and Free Speech: Comparative and International Analyses* (Griffiths, J. and Suthersanen, U. (eds.), Oxford University Press, 2005), at p. 169.

⁴¹ Information Society Directive 2001, article 5(3)(k). This defence is present in other national copyright laws, notably in the French Intellectual Property Code 1992.

⁴² See, Copyright Act 1976, section 107.

⁴³ The fair use factors are characterised by an “infinite elasticity” which results in their “inability to resolve difficult questions”, Nimmer at para. 13.05[A].

⁴⁴ Netanel, N.W., “Locating Copyright Within the First Amendment Skein” (2001) 54 Stanford L. Rev. 1, at 23.

5.3 THE PUBLIC INTEREST ASPECT

"When considering the public interest ... it is to be remembered that one feature ... is that justice should always be done and should be seen to be done"⁴⁵.

The concept of public interest is wide and may be said to underlie most national copyright laws; copyright systems in general seek to strike an appropriate balance between the rights of the copyright owner and the benefit of the public. "Whether a particular act is 'in the public interest' is probably not subject to any objective tests. Inherent in the noble motive of the public good is the notion that, in certain circumstances, the needs of the majority override those of the individual"⁴⁶.

Public interest is also expressly taken into account in the context of international copyright law. The TRIPS Agreement 1994 provides that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations"⁴⁷. Perhaps more significant is the express reference to the balance between the rights of authors and those of the general public in the Preamble to the WIPO Copyright Treaty 1996, "Recognising the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention"⁴⁸.

⁴⁵ *Ellis v. Home Office* [1953] 2 Q.B. 135, per Morris, L.J..

⁴⁶ Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at p.2.

⁴⁷ TRIPS Agreement 1994, Article 7.

⁴⁸ Similar provisions can be found in the Preamble to the WIPO Performances and Phonograms Treaty 1996.

It is interesting to note that the Berne Convention does not make any express provisions of the public interest, apparently paying more attention to the rights of authors. "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works", Preamble to the Berne Convention 1971. See Phillips, J., "The Berne Convention and the Public Interest" (1986) 11(157) *Columbia-VLA Journal of Law & the Arts* 165.

5.3.1 THE CONCEPT OF PUBLIC INTEREST IN NATIONAL COPYRIGHT LAWS

The public interest debate in the UK can be traced back to the early cases of *Millar v. Taylor*⁴⁹ and *Donaldson v. Beckett*⁵⁰. Both cases strongly focused on the need to find a balance between the rights of the author, on the one hand, and the interests of the general public, on the other⁵¹. Lord Macaulay addressed the importance that the public interest should occupy within the context of copyright law⁵², "The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated: and the least objectionable way of remunerating them is by means of copyright. ... It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good"⁵³. The public interest has ultimately guided the legislator⁵⁴ in determining many aspects of copyright protection, such as the term of copyright⁵⁵ and the extent of the statutory defences and permitted acts in relation to copyright⁵⁶.

⁴⁹ (1769) 4 BURR. 2301.

⁵⁰ (1774) 4 BURR. 2407.

⁵¹ For a general discussion of the cases and their underlying importance, see Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at pp. 28-33.

For discussion of *Millar v. Taylor*, see Sherman, B. and Bently, L., *The Making of Modern Intellectual Property Law* (Cambridge University Press, 2002) at pp.19-35, and Deazley, R., *On the Origin of the Right to Copy* (Hart Publishing, 2004), Chapter 7..

For discussion of *Donaldson v. Beckett* and its implications, see generally Rose, M., *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993), and in particular Appendix B which sets out Justice Nares' Vote, the opinion he delivered to the House of Lords on 15 February 1774. See also Deazley, R., *On the Origin of the Right to Copy* (Hart Publishing, 2004), Chapter 8.

⁵² The speech was made in 1842, when Lord Macaulay was opposing the passing of bills for a new Copyright Act to extend the period of copyright protection. The new 1842 Copyright Act was eventually passed and the term of copyright protection extended.

⁵³ Seville, C., *Literary Copyright Reform in Early Victorian England (the Framing of the 1842 Copyright Act)*, (Cambridge University Press, 1999), at p.6.

⁵⁴ "In Britain or any other Berne Convention State, copyright arises upon the creation of a literary or artistic work and is enforceable without formalities: its potency is accordingly the greater and the need to qualify it in the public interest may be more pressing", Cornish, W.R., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed., Sweet & Maxwell, London, 1999), at para. 13-03.

⁵⁵ "The public at large has an overwhelming interest in the reproduction of literary, dramatic and musical works, and we are satisfied that it would be quite impossible to justify a right in perpetuity", Report of the Copyright Committee, Cmnd 8662, HMSO, October 1952 at 7, para. 17; "The term of life plus 50 years is a compromise between on the one hand the economic interests of authors and their direct descendants and on the other hand the public

UNITED STATES OF AMERICA US copyright law is based upon the public interest and this is clearly reflected in the Constitution⁵⁷. In *Film Corp. v. Doyal*⁵⁸, the Court stated that "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labours of authors"⁵⁹.

The passing of the 1790 Copyright Act⁶⁰ and the 1834 landmark case of *Wheaton v. Peters*⁶¹, rejecting the natural rights theory as a premise for copyright protection, re-enforced the stance that copyright existed primarily to benefit the public interest and only secondarily to benefit the individual author⁶².

Overall, within US jurisprudence, public interest has had an important impact⁶³ on the limited duration of copyright protection⁶⁴ and on the exceptions, including both

interest in widespread and unfettered dissemination of works", Reform of the Law relating to Copyright, Designs and Performers' Protection, Cmnd 8302, HMSO, July 1981, Chapter 12, para. 5.

⁵⁶ "The public interest demands that not every unauthorised reproduction of copyright material should constitute an infringement of copyright. The aim of such exceptions is to avoid copyright acting as an impediment to the use of copyright material for certain defined purposes, while ensuring the economic interests of copyright owners are not thereby damaged", Reform of the Law relating to Copyright, Designs and Performers' Protection, Cmnd 8302, HMSO, July 1981, Chapter 3, para. 1.

⁵⁷ US Constitution, Article 1, section 8, "The Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".

⁵⁸ 286 U.S. 123 (1932).

⁵⁹ 286 U.S. 123, 127 (1932).

⁶⁰ Copyright Act on May 31, 1790, "An Act for the encouragement of learning by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned". Laws of the First Congress, Second Session, Chapter XV.

⁶¹ 33 U.S. (8 Peters) 591 (1834).

⁶² Patterson, reviewing *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (1834) and its dissenting judgments, observed that "The striking point about the premises of the majority and the dissenters is that they are polar, one proceeding from the interest of the public, the other from the interest of the individual creator. This is not to say that both views did not take into account the interest of both the public and the individual author; it is to say that their premises brought the justices to different conclusions as to how best to resolve the conflict between the public's interest in learning and the author's interest in his property. The majority, viewing copyright as a monopoly, were content to protect the author's property for a limited period under the conditions prescribed by the Statute. To do otherwise would be contrary to the public interest". See Patterson, L.R., *Copyright in Historical Perspective* (Nashville, Vanderbilt University Press, 1968), at p.211. Also, see Goldstein, P., *Copyright Principles, Law and Practice* 3 Vols. (Boston, Little, Brown & Co. 1989), at para. 1.1.

⁶³ See, Report of the Register of Copyrights on the General Revision of the US Copyright Law, 87th Congress, First Session, July 1961, at p. 6. On the purpose of copyright, the Report concluded that "The primary purpose of copyright is to stimulate the creation and

the doctrine of fair use and other specific statutory limitations⁶⁵, granted under the 1976 Copyright Act⁶⁶.

FRANCE

The position the public interest occupied in French copyright law over the centuries has been diverse. Leading commentators have argued that the regime of author's rights centres on the person of the author excluding, to a large extent, the interests of the public⁶⁷. However, public interest played a prominent role in the revolutionary French Decrees of 1791⁶⁸ and 1793; a role⁶⁹, not clearly different from its role in the

dissemination of intellectual works, thus advancing 'the progress of science and useful arts'. The grant of exclusive rights to authors is a means of achieving this end, and of compensating authors for their labors and their contributions to society. Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail. The ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination". Also, see *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), at 573 and 575 ("The State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavours", "... the respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the live act").

⁶⁴ *Twentieth Century Music Corp. v. Aiken*, 186 U.S.P.Q. 67 (1974) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("... the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

⁶⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 225 U.S.P.Q. 1073 (1985), at 1089 ("Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product."). Also, see *Goldstein v. California*, 412 U.S. 546 (1973); *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023 (1994).

⁶⁶ For a critical analysis of the importance of the public interest in the development of US statutory and judicial jurisprudence, see Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at Chapter 5.

⁶⁷ Desbois, H., "La loi française du 11 mars 1957" (1957) *Le droit d'auteur* 84; Desbois, H., *Le Droit d'auteur en France* (3rd ed., Dalloz, Paris, 1978), at p.265; Plaisant, R., "La protection du logiciel par le droit d'auteur" (1983) *G.P.* 2.348.

⁶⁸ "The most sacred, the most legitimate, the most unassailable, and, if I may say, the most personal of all properties is the work, fruit of the thought of a writer; however, it is a property of a kind quite different from other properties. When an author has given his work to the public, when this work is in the hands of everyone when all educated men know it, when they take to themselves the beauties it contains, when they have memorised its most felicitous aspects; it seems that from this moment the writer has associated the public with his property, or rather that he has transferred it to [the public] entirely; however, as it is

English and American copyright systems⁷⁰. By the time the Law of March 11, 1957 was adopted, French jurisprudence appeared to attach greater weight to the interests of the author than of those of the public⁷¹. In 1985 the public interest debate flourished again in the context of the reform of the law⁷² and the same holds true at the turn of the twenty-first century; the first signs of the revival of the public interest have once again started to appear. The prevalence of the public interest has apparently not been consistent over the years; however that should not be interpreted as a disregard by French jurisprudence of such an important societal principle. The overall placement of the public interest today and its evolutionary journey have thus been described by Caron, "The public's interest exists *discreetly* [emphasis added for the present purposes] in copyright law. It is a controversial subject. Thus, while Balzac exclaimed 'a terrible word looms up here: the public's

extremely just that men who cultivate the domain of thought should draw some fruit from their work, it is necessary that, for their whole life and for some years after their death, no-one may, without their consent, dispose of the product of their genius. But also, after the fixed time, the property of the public commences, and everyone may print, publish the works which have contributed to the enlightenment of the human spirit", Translation (Sterling at pp. 1258-9 (with permission)) of the speech by Le Chapelier introducing the draft Decree of January 13-19, 1791. For the full text of Le Chapelier's speech, see *Archives Parlementaires de 1787 à 1860, Première Série, Tome xxii*, January 13, 1791, p. 210 *et seq.*; *Le Moniteur Universel*, January 15, 1791.

⁶⁹ In 1825, a committee, appointed by the government, and set up under the Chairmanship of Vicomte de la Rochefoucault rejected a perpetual copyright concluding that "Such a privilege existed nowhere else; it would harm education by a monopoly lasting too long; it would become either onerous for the public, or illusory for the families; it would often falsely interpret the intentions of the author himself, who by publishing his work, had hoped that editions would increase and multiply easily after him. It therefore appeared to us, Sire, that while the present term of the exclusive right should be extended there should be a limit thereto". See, Matthyssens, J., "Copyright Law Schemes in France during the Last Century" (1954) R.I.D.A. 15.

⁷⁰ "Appreciation of the similarities between the initial French and US literary property regimes may hold significance for modern copyright systems if only because it undermines 'historical' assertions of the inherent and original incompatibility of the French and Anglo-American approaches to copyright", Ginsburg, J.C., "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1991) 147 R.I.D.A. 125, at 131.

⁷¹ "The public interest at that time seems only to have been taken into account in relation to limitations upon the rights of authors, including the question of duration. It was recognised that the author had a social role and must therefore make certain concessions in the public interest", Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at p.172.

⁷² Commenting on the adoption of the 1985 Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises, Jack Lang, the then Minister of Culture, stated that "This draft law drew its inspiration from three principles: to facilitate concerted action among those participating in the creation of intellectual works; to provide them with one of the most advanced systems of legal protection in the world; to foster the dissemination of works to the public". See, Lang, J., "The law of 3 July 1985" (1986) 127 R.I.D.A. 6.

interest', Victor Hugo considered that 'literary property belongs, more than any other, to the general interest'. The fact nevertheless remains that the history of authors' rights testifies to a variable consideration of the general interest in literary and artistic property law – which proves that the rights of the author and those of the public are indissociable in nature, a fact which was perceived right from the revolutionary period"⁷³.

GERMANY

In German author's rights jurisprudence, the rights of authors have traditionally been considered to derive primarily from natural law, while social and cultural factors have also contributed⁷⁴. In the early 1837 Prussian Law, public interest was apparently not taken into account in a positive sense, as had been the case in the UK, US and France, but it was in a negative sense in the context of limiting the term of protection. In the context of the evolution of German copyright law, its judicial and legislative development has been, since 1949, increasingly influenced by the Basic Law of the Federal Republic of Germany. The Basic Law provides certain rules regarding the public interest, "Expropriation shall be permitted only in the public interest. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected"⁷⁵. Case law⁷⁶ indicates that, within the context of article 14 of the

⁷³ Caron, C., "Abuse of Rights and Authors' Rights" (1998) 176 R.I.D.A. 3, at p.54.

⁷⁴ Schricker, G., in Schricker, G., *Urheberrecht*, Kommentar (2nd ed., Munich, C.H. Beck'sche Verlagsbuchhandlung, 1999), Introduction, para. 11; Wandtke, A., "Zur kulturellen und sozialen Dimension des Urheberrechts" (1993) 123 U.F.I.T.A. 5..

⁷⁵ Basic Law, article 14(3). Article 14 concerns the rights to property, including protection of the economic rights of the copyright owner, and expropriation, and has to be interpreted in the light of article 5 concerning freedom of expression and information. Article 5 is analysed in para. 2.4.5.

⁷⁶ "*Bibliotheksgroschen*", BVerfGE, (1972) 8 G.R.U.R. 485; "*Kirchen-und Schulgebrauch*", BVerfGE, (1972) 8 G.R.U.R. 481; "*Schulfunksendungen*", BVerfGE, (1972) 8 G.R.U.R. 487; "*Tonbandvervielfältigung*", BVerfGE, (1972) 8 G.R.U.R. 488; "*Schallplatten*", BVerfGE, (1972) 8 G.R.U.R. 491; "*Kirchenmusik*", BVerfGE, (1979) 84 U.F.I.T.A. 317. All these cases considered situations where there was a need to balance author's economic interests against the general public interest, both sets of interests safeguarded under the German Constitution. For a discussion of and commentary of the cases, see Fechner, F., *Geistiges Eigentum und Verfassung* (Tübingen, Mohr Siebeck, 1999), at p. 165; Ruete, M., "The *Kirchenmusik* Judgment – Constitutional and Intellectual Property Rights" (1980) E.I.P.R. 198; Dietz, A., "Letter from Germany" (1973) *Copyright* 93.

Basic Law, the “public interest arises in a negative sense as the basis for possible restrictions upon the property rights of authors”⁷⁷.

However, since the adoption of the 1965 Author’s Right and Related Protection Rights Law, the need for balancing the interests of authors with those of the general public has developed⁷⁸. Recently, “there are signs that the public interest in having an effective copyright system is being increasingly recognised”⁷⁹- “Copyright policy is challenged by the precarious situation facing music, film and literature. What is needed is an up-to-date and reliable law for the protection of authors’ rights and related rights, which gives the cultural industries the security required to trade successfully, thereby encouraging culture to flourish”⁸⁰.

5.3.2 A STATUTORY PUBLIC INTEREST?

For the present purpose of examining the relationship between public interest and freedom of expression, public interest must be considered in its role as a statutory provision, an exception and limiting factor to the exclusive rights awarded to an author under national copyright regimes. This analysis is necessary in order to evaluate the argument that public interest is one of the internal controls of copyright which, when combined with other existing limitations⁸¹, provides adequate protection to another party’s right of freedom of expression.

It is interesting that, of the four national laws covered in this thesis, the United Kingdom is the only national law that appears to have given express statutory

⁷⁷ Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at p.209.

⁷⁸ “Exploitation rights grant to authors the material gain from their works. This granting is subject to certain limitations which are important from the practical standpoint: the needs of cultural life are served by freedom of quotation and borrowing. In the interests of public information, limits are placed on copyright in favour of press, radio and film reporting”, Ulmer, E., “Letter from Germany” (1965) *Copyright* 275, 278.

⁷⁹ Davies, G., *Copyright and the Public Interest* (2nd ed., Sweet & Maxwell, 2002), at p.231. Also, see Kleinke, Y., *Pressdatenbanken und Urheberrecht* (Köln etc., Carl Heymans Verlag, 1999); Fechner, F., *Geistiges Eigentum und Verfassung* (Tübingen, Mohr Siebeck, 1999), at p. 134.

⁸⁰ Speech of Prof. Dr. H. Däubler-Gmelin, the then German Minister of Justice, “Privater Vervielfältigung unter dem Vorzeichen digitaler Technik” at POPKOMM, Cologne, August 20, 1999 (Available online at <http://www.bundesjustizministerium.de>).

⁸¹ Such limitations include the fair use and fair dealing doctrines (see para. 5.2), the principle of idea/expression dichotomy (see para. 5.4), the limited copyright term (see para. 5.5) and the requirement of originality (see para. 5.5).

recognition to the public interest⁸². The CDPA 1988 provides, "Nothing in this part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise"⁸³. However, those opposed to the recognition of a public interest defence, have suggested that section 171(3) does not amount to an express statutory recognition⁸⁴.

The defence has been raised on a number of cases⁸⁵. More recently, the public interest defence was considered in the case of *Hyde Park Residence Ltd v. Yelland and Others*⁸⁶. The case involved the publication by a newspaper of still photographs, taken on a security camera, of a visit by Diana, Princess of Wales, and Dodi Fayed, to Villa Windsor in Paris, on the day before their deaths in a car accident. A set of the stills prints, showing their arrival at and departure from the villa, were sold by a villa employee to a newspaper. The newspaper, without the claimant's consent, published two prints in a five-page article entitled "Video that

⁸² The public interest was initially applied in cases of breach of confidence where the plaintiff sought to maintain the confidentiality of facts revealing his or her own 'iniquity' – *Gartside v. Outram* (1856) 26 L. J. 113. Over the years, the definition of 'iniquity' expanded to cover disclosures of information which the public "needs to know" – *Lion Laboratories v. Evans* [1985] Q.B. 526 (C.A.).

⁸³ CDPA 1988, section 171(3). It is generally accepted that this section preserves the common law defence of public interest which "is a defence outside and independent of statutes, is not limited to copyright cases and is based upon a general principle of common law" – *Beloff v. Pressdram* [1973] R.P.C. 783.

⁸⁴ This view is consistent with Lord Phillip's statement in *Ashdown* that "The other restriction which requires consideration is the defence to a claim for breach of copyright that can be mounted on the basis of "public interest". This is not a statutory defence, but one which arises at common law, and which subsists by virtue of section 171(3) of the 1988 Act", *Ashdown v. Daily Telegraph* [2002] Ch. 149, at para. 34. For a discussion of the alternative interpretations of the section, see Burrell, R., "Defending the Public Interest" (2000) E.I.P.R. 394, at 402-3 – "A technical or pedantic construction focuses on the fact that the wording of the section does not actually provide for a defence. Rather, the section only states that any existing defence is preserved. If one concludes from the pre-1988 authorities that a public interest defence never in fact existed, it can be argued that section 171(3) is in no way sufficient to bring such a defence into being. ... Alternatively, it has been argued that the reference in this section to 'restricting enforcement' shows that Parliament was not referring to a public interest defence at all, but rather was only making it clear that equitable remedies are to remain discretionary". Also, see MacMillan, F., "Towards a Reconciliation of Free Speech and Copyright" (1996) *The Yearbook of Media and Ent. Law* 199, at 223-26.

⁸⁵ See, *Hubbard v. Vosper* [1972] 2 W.L.R. 394; *BSC v. Granada TV Ltd.* [1981] A.C. 1096; *Times Newspapers Ltd. and Harper Collins Ltd. v. MGN Limited* [1993] E.M.L.R. 442; *A-G v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109. Also, see Griffiths, J., "Copyright Law and Censorship – The Impact of the Human Rights Act 1998", (1999) 4 *The Yearbook of Copyright and Media Law* 3.

⁸⁶ [2001] Ch. 143. For commentary of the case, see Burrell, R., "Defending the Public Interest" [2000] E.I.P.R. 394; Phillips, J., "When is a Fact" (2000) *Ent. L. Rev.* 116.

shames Fayed's father". The claimant brought an action for copyright infringement against the editor, publishers and printers of the newspaper and the employee. The defendant relied on the fair dealing and public interest defences under the CDPA 1988. The trial judge upheld both defences and dismissed the claimant's application for summary judgement. On appeal, the Court overturned that decision. A majority of the Court of Appeal rejected the submission that there was a general public interest defence to an action for copyright infringement. The court defined the scope of the defence narrowly, "A court would be entitled to refuse to enforce copyright if the work is: (i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii)"⁸⁷.

The relationship between the public interest defence and freedom of expression has been considered in a number of cases. In *PCR Limited v. Dow Jones Telerate Limited*⁸⁸, the court made an express connection between the two rights, "This defence of public interest is more common in relation to breach of confidence, but it has been recognised, often in overlapping cases of copyright and breach of confidence, as being relevant as a defence to a claim of breach of copyright. It is also established that it is not limited to the disclosure of iniquity. It is consistent with and reinforced by Article 10 of the European Convention of Human Rights"⁸⁹.

The potential of the public interest to protect freedom of expression was illustrated in the case of *Lion Laboratories v. Evans*⁹⁰ where the Court of Appeal accepted that publication of information concerning the effectiveness of certain breathalysing machines was in the public interest and could not be prevented on the basis of breach of confidence or copyright infringement. Even though the case pre-dated the Human Rights Act 1998, the Court of Appeal referred to the potential of a conflict between the interests of the copyright owner and freedom of expression⁹¹.

⁸⁷ [2001] Ch. 143, at para. 64. This narrow interpretation of the scope of the public interest was effectively rejected in the later case of *Ashdown v. Telegraph Group Limited* [2002] Ch. 149; see discussion below.

⁸⁸ [1998] F.S.R. 170.

⁸⁹ [1998] F.S.R. 170, at 187.

⁹⁰ [1985] Q.B. 526 (C.A.).

⁹¹ "The problem before the judge and before this court is how best to resolve, before trial, a conflict of two competing public interests. The first public interest is the preservation of the

The ambit of the public interest defence and its role in cases where freedom of expression is invoked was considered in *Ashdown v. Telegraph Group Limited*⁹². The Court of Appeal, rejected the narrow interpretation that Aldous L. J. applied to the public interest in *Hyde Park Residence v. Yelland And Others*⁹³, stating that: "... we do not consider that Aldous L.J. as justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion of Mance L.J. that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition"⁹⁴. Acknowledging that situations of conflict between copyright and freedom of expression can arise, albeit rarely, the court went on to observe that "Now that the Human Rights Act 1998 is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the 1988 Act. In such circumstances, we consider that section 171(3) of the Act permits the defence of public interest to be raised"⁹⁵. The court stressed the rarity of such situations further, concluding that "We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches"⁹⁶.

5.3.3 CONCLUSIONS

right of organisations, as of individuals, to keep secret confidential information. The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer. The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press which is recognised by our law, as well as by article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969); the duty to publish, the countervailing interest of the public in being kept informed of matters which are of real public concern, is an inroad on the privacy of confidential matters.", [1985] Q.B. 526 (C.A.), at 536-7.

⁹² [2002] Ch. 149. For a discussion of the facts of the case and further analysis, see paras. 3.5.2 and 4.5.2.1.

⁹³ [2001] Ch. 143.

⁹⁴ [2002] Ch. 149, at para. 58.

⁹⁵ [2002] Ch. 149, at para. 58.

⁹⁶ [2002] Ch. 149, at para. 59.

Public interest has played an important role in the framing of copyright laws. Most such laws have their origin in the need to balance the interests of an author in his intellectual creations against those of the general public. In this respect, the public interest has prominently featured in national jurisprudence and judicial decision-making. Thus the public interest as a general legal concept of an abstract nature, could arguably be consistent with the protection of another party's right of freedom of expression, in the sense that it serves to curtail, to an extent, the exclusive rights awarded to an author.

In UK cases the scope of the public interest has been narrowly defined, which would appear to imply that, given this restricted ambit, it cannot adequately protect freedom of expression. The case of *Ashdown*⁹⁷ seems to be the only case that has set out the potential interaction of copyright and freedom of expression, in terms less vague than its predecessors: any potential claim to freedom of expression can be accommodated through the limitations already present in the 1988 Act and although instances can arise where it might be in the public interest to allow freedom of expression to prevail over an author's copyright, such instances would appear to be rare.

In conclusion, it may be argued that UK courts appear to support the general argument that existing limitations, the public interest included, do afford sufficient protection to the individual's right of freedom of expression.

However, given the analysis of the relevant case law and of the reasoning underlying these decisions, such an argument does not appear sustainable. Given the fact that the public interest is almost absent from most national copyright legislations, coupled with the fact that even where it is statutorily provided for, "the question whether any public-interest defence really does exist in relation to an action for breach of copyright ... is quite unresolved"⁹⁸, paint a weak picture of the actual importance of the public interest in cases involving freedom of expression. It could thus be deduced that public interest does not appear to provide sufficient

⁹⁷ [2002] Ch. 149.

⁹⁸ MacMillan, F., "Towards a Reconciliation of Free Speech and Copyright" (1996) *The Yearbook of Media and Ent. Law* 199, at 225.

means for individuals to protect their human right in cases of alleged copyright infringement; it is a right loosely defined and not recognised as a right of the individual *per se*.

5.4 NON-PROTECTION OF IDEAS

On the international level, the principle of non-protection of ideas is expressly recognised in the TRIPS Agreement 1994⁹⁹.

On the national level, the doctrine of the idea/expression dichotomy is mostly prevalent in the Anglo-American copyright tradition. Although the doctrine is expressly protected in section 106(2) of the US Copyright Act 1976¹⁰⁰, it does not enjoy such distinct legislative protection under the UK CDPA 1988¹⁰¹. Nevertheless, both national laws and the US law in particular, have developed extensive case law on this internal safety valve to copyright.

The principle is to be understood as preventing third parties from copying the copyright owner's specific expression, while allowing them to make free use of ideas¹⁰² and facts contained in any given work which is protected by copyright¹⁰³. The essence of the doctrine has been said to be that it "assures authors the right to

⁹⁹ Article 9(2), "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such". This principle is further discussed in paras. 1.3.2.1 and 5.4.

¹⁰⁰ "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work".

¹⁰¹ The idea/expression dichotomy is also recognised in Article 2(8) of the Berne Convention 1971; "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information".

¹⁰² "Ideas, it has always been admitted...are free as air", Birrell, A., *Seven Lectures on the Law and History of Copyright in Books* (2nd ed., Fred B. Rothman & Co, London, 1971) at 167.

¹⁰³ *Donoghue v. Allied Newspapers Ltd.* [1938] Ch. 106, at 109-10; *Gleeson v. H.R. Denne Ltd.* [1975] R.P.C. 471; *Gomme (E.) Ltd. v. Relaxateze Upholstery Ltd.* [1976] R.P.C. 377; *Catnic Components Ltd. v. Hill & Smith Ltd.* [1978] F.S.R. 405; *LB (Plastics) Ltd. v. Swish Products Ltd.* [1979] R.P.C. 551, H.L.; *George Ward (Moxley) Ltd. v. Richard Sankey Ltd.* [1988] F.S.R. 66; *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.* [2001] F.S.R. 11, H.L..

their original expression, but encourages others to build upon freely upon the ideas and information conveyed by a work”¹⁰⁴.

UNITED
KINGDOM

The case of *IBCOS Computers Ltd v. Barclays Mercantile Highland Finance Ltd*¹⁰⁵ stated the position of the UK concept of the idea/expression dichotomy “If an idea embodied in the plaintiff’s work is sufficiently general, the mere taking of that idea will not infringe. If however, the idea is worked out in some detail in the plaintiff’s work and the defendant reproduces the expression of that idea, then there may be an infringement. It is a question of degree. The same applies if the work is functional or not, and whether visual or literary”¹⁰⁶.

*Ravenscroft v. Herbert*¹⁰⁷ is a frequently cited point of reference on the issue of idea/expression dichotomy. The case involved a claim by the author of a non-fiction book entitled ‘The Spear of Destiny’ that the defendant had infringed his copyright in the book by writing a novel called ‘The Spear’. The central feature of both books was a spearhead which forms part of the Hapsburg Treasure exhibited in Vienna. However, the books were of a different nature; while the plaintiff’s book combined historical facts and a degree of mysticism, the defendant’s book was a thriller. Brightman J. concluded that “the plaintiff cannot claim a monopoly in historical facts. The law of copyright does not preclude another author from writing upon the same theme Otherwise one would be driven to the conclusion that the plaintiff has a monopoly of the facts”¹⁰⁸. However, protection was given to the plaintiff on the basis of appropriation of elements of the novel’s plot.

Another case of considerable importance within the UK jurisprudence of the idea/expression dichotomy is *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*¹⁰⁹. The case involved a claim of copyright infringement by the plaintiff, owner of copyright in the artwork for a fabric design, against the defendant, creator of a similar design, on the basis that the latter’s design had copied many elements, amounting to a substantial part, of the plaintiff’s design. The Court of Appeal,

¹⁰⁴ *Feist Publications Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991), at 349-50.

¹⁰⁵ [1994] F.S.R. 275.

¹⁰⁶ [1994] F.S.R. 275, at 291.

¹⁰⁷ [1980] R.P.C. 193.

¹⁰⁸ [1980] R.P.C. 193, at 205.

¹⁰⁹ [2001] F.S.R. 11 (H.L.).

overturning the trial judge, held that no substantial part of the original design had been copied. Designers Guild appealed to the House of Lords arguing that the test for infringement was not whether the images looked the same, but whether their similarities and differences amounted to a substantial taking of skill, labour and judgement in the image. Lord Hoffmann's statement regarding "ideas and expression" is considered to be of significance. In his judgement, he discussed the question of what is really meant by the notion that there is no copyright in ideas and what is the basis of the so-called idea/expression dichotomy¹¹⁰.

The most recent case where the idea/expression dichotomy was considered is *Michael Baigent and Richard Leigh v. The Random House Group Limited*¹¹¹. In this case, the two claimants alleged that the novel 'The Da Vinci Code' authored by Dan Brown, constituted an infringement of copyright in their earlier novel entitled 'The Holy Blood and the Holy Grail', on the basis that Dan Brown had appropriated the theme and ideas explored in their book. The court, dismissing the plaintiffs claim, held that "... it is accepted that an author has no copyright in his facts nor in his ideas but only in his original expression of such facts or ideas. Original in that

¹¹⁰ "It is often said ... that copyright subsists not in ideas but in the form in which the ideas but in the form in which the ideas are expressed. The distinction between expression and ideas finds a place in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ([1994] O.J. L336/213), to which the United Kingdom is a party (see Article 9.2: 'Copyright protection shall extend to expressions and not to ideas ...'). Nevertheless, it needs to be handled with care. What does it mean? As Lord Hailsham of St Marylebone said in *L.B. (Plastics) Ltd. v. Swish Products Ltd.* [1979] R.P.C. 551 at 629, 'it all depends on what you mean by 'ideas'.

Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work, but the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. ...

My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. ... The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. ...

Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part.", [2001] F.S.R. 11 (H.L.), at paras. 23-26.

¹¹¹ [2006] E.W.H.C. 719 (Ch.).

context does not mean novel of course¹¹². ... In other words, the facts and the themes and the ideas cannot be protected but how those facts, themes and ideas are put together can be"¹¹³.

The interrelation between the idea/expression dichotomy and freedom of expression was addressed in the case of *Ashdown v. Telegraph Group Ltd.*¹¹⁴. The Court of Appeal addressed the issue of whether that principle was sufficient to safeguard a party's freedom of expression vis-à-vis the author's copyright and concluded that "Copyright does not normally prevent the publication of the information conveyed by the literary work. Thus it is only the freedom to express information using the verbal formula devised by another that is prevented by copyright. This will not normally constitute a significant encroachment on the freedom of expression. It is also important that the citizen should be free to express the ideas and convey the information in a form of words of his or her choice. It is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form devised by someone else"¹¹⁵.

UNITED STATES OF AMERICA The US case of *Baker v. Selden*¹¹⁶ (1879) employed the doctrine of idea/expression dichotomy to deny a claim of copyright infringement. The case involved two books describing a system of accounting. Both books also included various forms which could be used to implement the accounting system but the defendant's forms had their columns arranged in a different way from the plaintiff's forms. The court held that "contrary to the plaintiff's assertion, copyright did not and could not extend to the system itself, which was the 'idea' behind the plaintiff's work"¹¹⁷ and although the plaintiff's description of the accounting system was entitled to copyright protection, copyright could not be used to prevent others from describing or using the same system themselves¹¹⁸.

¹¹² [2006] E.W.H.C. 719 (Ch.), at para. 172.

¹¹³ [2006] E.W.H.C. 719 (Ch.), at para. 176.

¹¹⁴ [2001] E.M.L.R. 44 (C.A.). For a discussion of the facts of the case and further commentary, see paras. 2.5.2 and 3.5.2.1.

¹¹⁵ [2001] E.M.L.R. 44 (C.A.), at para. 31.

¹¹⁶ 101 U.S. 99 (1879).

¹¹⁷ 101 U.S. 99, 104-05 (1879).

¹¹⁸ 101 U.S. 99, 104 (1879).

In *Landsberg v. Scrabble Crossword Game Players, Inc.*¹¹⁹, the Ninth Circuit considered a claim for copyright infringement involving two books which described different strategies that could be used in playing the game of Scrabble. Even though the defendant had paraphrased a “significant part” of the plaintiff’s book, the court dismissed the plaintiff’s claim holding that “while the similarities between the two works might prove infringement in many cases, the limited range of expressions inherent in the ideas behind a book about how to play Scrabble requires more literal copying to prove infringement”¹²⁰. A similar decision was reached in *Litchfield v. Spielberg*¹²¹, where copyright infringement was denied on the basis that the movie *E.T. – The Extra Terrestrial* was not sufficiently similar to the elements of the musical play *Lokey from Maldemar*. In *Berkic v. Crichton*¹²², the production of the movie *Coma* was held to be not sufficiently similar to the screenplay *Reincarnation, Inc.*, thus not constituting copyright infringement, while in *Aliotti v. R. Dakin & Co.*¹²³, the court rejected the plaintiff’s claim that the defendant’s line of stuffed dinosaurs infringed her ‘Ding-A-Saur’ line of stuffed dinosaurs¹²⁴.

A number of cases have expressly referred to the doctrine of the idea/expression dichotomy as representing a “definitional balance”¹²⁵ between copyright and First Amendment claims¹²⁶. In *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s*

¹¹⁹ 736 F.2d 485 (9th Cir.), cert. denied, 469 U.S. 1037 (1984).

¹²⁰ 736 F.2d 485, 488-89 (9th Cir.), cert. denied, 469 U.S. 1037 (1984).

¹²¹ 736 F.2d 1352 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

¹²² 761 F.2d 1289 (9th Cir.), cert. denied, 474 U.S. 826 (1985).

¹²³ 831 F.2d 898 (9th Cir. 1987).

¹²⁴ “No copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls. Appellants therefore may place no reliance upon any similarity in expression resulting from either the physiognomy of dinosaurs or from the nature of stuffed animals.”, 831 F.2d 898, 901 (9th Cir. 1987).

¹²⁵ See, Nimmer, M.B., “The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy”, (1968) 56 Cal. L. Rev. 935, at 944.

¹²⁶ In adopting this approach, US courts have often relied on early academic commentary and, in particular a review article by Nimmer, M.B., “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) 17 UCLA L. Rev. 1180. In his article, Nimmer concluded that copyright should in general be immune to strict First Amendment scrutiny because any conflict between copyright and free speech could be resolved through “safety valves” inherent in copyright, those safety valves being the idea/expression dichotomy principle, the fair use exception and the limited copyright duration. For subsequent commentary on this matter, see Goldstein, P., “Copyright and the First Amendment” (1970) 70 Colum. L. Rev. 983; Sobel, L.S., “Copyright and the First Amendment: A Gathering Storm?” in 19 *Copyright Law Symposium* 43 (American Society of

*Corp.*¹²⁷, the Ninth Circuit stated that “The impact, if any, of the First Amendment on copyright has not been discussed by the [Supreme] Court. We believe this silence stems not from neglect but from the fact that the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the First Amendment.”¹²⁸ This view was later supported in *Fantasy, Inc. v. Fogerty*¹²⁹ which upheld that “The ‘idea/expression’ dichotomy serves to accommodate any First Amendment concerns”¹³⁰.

In *Harper & Row, Publishers, Inc. v. Nation Enters.*¹³¹, the court once again stressed that First Amendment protections are “already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas”¹³². In effect, Harper & Row “allowed restrictions of speech because the limitations were seen as enhancing speech overall by protecting the economic incentive for expression”¹³³. The same conclusions were reached by the court in the case of *United Video, Inc. v. Federal Communications Commission*¹³⁴, “In the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no [F]irst [A]mendment right to do so. Although there is some tension between the Constitution’s copyright clause and the [F]irst [A]mendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression”¹³⁵.

CONCLUSIONS However, it appears that the idea/expression dichotomy principle falls short of adequately safeguarding free speech vis-à-vis copyright in several respects. Firstly,

Composers, Authors and Publishers (eds.) 1971); Denicola, R.C., “Copyright and Free Speech: Constitutional Limitations on the Protection of Expression” (1979) 67 Cal. L. Rev. 283.

¹²⁷ 562 F.2d 1157 (9th Cir. 1977).

¹²⁸ 562 F.2d 1157, 1170 (9th Cir. 1977).

¹²⁹ 664 F. Supp. 1345 (N.D. Cal. 1987).

¹³⁰ 664 F. Supp. 1345, 1351 (N.D. Cal. 1987).

¹³¹ 471 U.S. 539 (1985). For the facts of the case and further commentary, see para. 4.5.3.1.

¹³² 471 U.S. 539, 560 (1985).

¹³³ Chemerinsky, E., “Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional” (2002) 36 Loy. L. A. L Rev. 82, at 88. Also, see Fraser, S., “The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet” (1998) 16 Cardozo Arts & Ent. Law J. 1, at pp. 10-21.

¹³⁴ 890 F.2d 1173 (D.C. Cir. 1989).

¹³⁵ 890 F.2d 1173 (D.C. Cir. 1989) at 1191.

there are instances where literal copying is necessary in order effectively, authentically and convincingly to convey a message¹³⁶. Verbatim copying will sometimes be allowed under the fair use/fair dealing limitations¹³⁷, but only if it satisfies the limitation's requirements. In addition, such copying must not constitute a substantial portion of existing literary expression. Case law does exist, albeit limited, which appears to suggest that the right of freedom of expression might not be adequately served if verbatim copying is indiscriminately prohibited. In *Cohen v. California*¹³⁸, the Supreme Court recognised that "we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"¹³⁹. In the UK case of *Ashdown v. Telegraph Group Ltd.*¹⁴⁰, the Court of Appeal observed that there are situations where preservation of freedom of expression might extend to protecting the very format of expression of the original work:

"In most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances, it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected. Strasbourg jurisprudence¹⁴¹ demonstrates, however, that circumstances can arise in which freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another"¹⁴².

¹³⁶ In his 1970 article, Nimmer had proposed a compulsory license to copy news photographs. See Nimmer, M.B., "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" (1970) 17 UCLA L. Rev. 1180. However, years later he did recognize that a speaker's need to copy expression in order to effectively convey a message need not be confined to news photographs or even other graphic works; he accepted that there are a number of instances where "vital news elements will be lost unless the exact language can be quoted". See, Nimmer at para. 1.10[D].

¹³⁷ For a detailed discussion of the limitations, see para. 5.2.

¹³⁸ 403 U.S. 15 (1971).

¹³⁹ 403 U.S. 15 (1971) at 26.

¹⁴⁰ [2001] E.M.L.R. 44 (C.A.).

¹⁴¹ The court cited the cases of *Jersild v. Denmark*; (15890/89) (1994) 19 E.H.R.R. 1, and *Fresoz and Roire v. France* (1999) 5 B.H.R.C. 654.

¹⁴² [2001] E.M.L.R. 44 (C.A.), at paras. 39-43.

Nevertheless, case law to date appears to illustrate that, in its current state, copyright law does not expressly recognise that there might be instances where verbatim quotation of large portions of existing works should be allowed in order to enhance the effectiveness of communication.

Secondly, it is clearly difficult to draw a clear line between what constitutes an idea and what constitutes expression. According to Yen, "The idea/expression dichotomy is notoriously malleable and indeterminate, far more useful as a shorthand for justifying judges' case-by-case conclusions regarding when a defendant has *prima facie* inappropriately copied than as a mechanism for predicting what sorts of copying and borrowing are permissible"¹⁴³.

It appears that over the years, courts have broadened the scope of the author's exclusive right of reproduction. As a result, appropriation of an author's expression has not only been upheld where literal copying has taken place, but also in cases where the overall style and structure of a work has been taken even if the actual speech of the original work has only been copied at a high level of abstraction and there is no close similarity of word between the two works¹⁴⁴. Substantial similarity between two works can constitute copyright infringement: the boundaries of this concept are not necessarily confined to the establishment of literal copying. If the new work can be viewed overall as evoking the same "total concept and feel" as the

¹⁴³ Yen, A.C., "A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'" (1989) 38 Emory L. J. 393, at pp. 405-06.

¹⁴⁴ See, *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977); *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607 (7th Cir. 1982), at 619-20; *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), at 1232-33; *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127 (N.D. Cal. 1986); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (8th Cir. 1987), at 120-21; *Digital Communications Assocs., Inc. v. Softklone Distrib. Corp.*, 659 F. Supp. 449 (N.D. Ga. 1987); *Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc.*, 674 F. Supp. 671 (D. Minn. 1987); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987); *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316 (9th Cir. 1987); *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731 (4th Cir. 1990) at 734; *Rey v. Lafferty*, 990 F.2d 1379 (1st Cir. 1993) at 1395. For a detailed discussion of this issue, see Netanel, N.W., "Locating Copyright Within the First Amendment Skein" (2001) 54 Stanford L. Rev. 1, at pp. 12-19. For a critical analysis of the above-mentioned cases, see Yen, A.C., "A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'" (1989) 38 Emory L. J. 393, at pp. 407-420.

original, the defendant is in risk of having breached the latter work's copyright¹⁴⁵. Commenting on the vague nature of this principle, Judge Learned Hand observed that the line between idea and expression, "wherever it is drawn, will seem arbitrary"¹⁴⁶. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*¹⁴⁷, the Second Circuit recognised the difficulty of separating idea from expression "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be ad hoc"¹⁴⁸.

Commentators have argued that the non-protection of ideas does not constitute an effective means of preserving the right of freedom of expression and accordingly, should not be considered as a safety valve inherent to copyright sufficient to accommodate freedom of expression interests. Netanel observes that "the First Amendment protection afforded by copyright's idea/expression dichotomy is no less

¹⁴⁵ *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936) (held that parallel plot development between a movie and a play did constitute copyright infringement despite the absence of literal copying); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), at 1110 (held that the defendant's greeting card may constitute copyright infringement because it was imitative despite the fact that it had copied neither copyright text nor copyright artwork).

¹⁴⁶ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), at 122. In this case, concerning two plays with similar plots and characters, Judge Learned Hand authored the most widely quoted distinction between idea and expression: "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended" (at 121). Several cases dealing with the issue of the idea/expression dichotomy have cited Hand's test, including *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982), at 624; *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), at 1253, *cert. dismissed*, 464 U.S. 1033 (1984); *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.), at 49, *cert. denied*, 476 U.S. 1159 (1986). The importance of the judge's statement was emphasized in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), at 1163, where the Ninth Circuit stated that "No court or commentator ... has been able to improve upon Judge Learned Hand's famous 'abstractions test' articulated in *Nichols*...". Despite the importance that has been attached to Hand's assertion, his statement still does not clarify the boundaries between ideas and expression. Besides, Hand himself admitted that his solution rested ultimately upon instinct "Nobody has ever been able to fix that boundary, and nobody ever can" – *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), at 121. Also, see Yen, A.C., "A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'" (1989) 38 Emory L. J. 393, at p. 405.

¹⁴⁷ 274 F.2d 487 (2d Cir. 1960).

¹⁴⁸ 274 F.2d 487 (2d Cir. 1960), at 489. Also, see *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971), at 742.

uncertain, unstable and illusory than the dichotomy itself¹⁴⁹. In fact, some commentators have gone as far as to suggest that the vagueness characteristic of this principle goes not only against freedom of expression¹⁵⁰, but undermines the argument that copyright can not amount to censorship¹⁵¹.

The difficulty in drawing the line between an idea and expression, coupled with the fact that there are instances where the very expression of an idea must be copied verbatim in order to convey the desired message render this principle inefficient as a means of protecting freedom of expression. It is submitted that freedom of expression should not be attempted to be hastily accommodated within the blurred and vague ambit of the idea/expression dichotomy. It is suggested that while the doctrine goes some way towards taking into account the individual's human right, it does not cover all situations of potential conflict. Freedom of expression should not be dependent upon ad hoc judicial decisions.

5.5 TERM OF COPYRIGHT PROTECTION

In addition to the exceptions and limitations already examined in this Chapter, commentators have, on occasions, referred to the limited term of copyright protection as a factor that curtails an author's copyright, thus contributing to the harmonisation of copyright and freedom of expression.

This issue was addressed by Nimmer in 1970¹⁵². In his frequently cited article, he put forward the argument that copyright is immune from challenges under the First

¹⁴⁹ See, Netanel, N.W., "Locating Copyright Within the First Amendment Skein" (2001) 54 Stanford L. Rev. 1, at p. 19.

¹⁵⁰ The doctrine "may be a tolerable burden as a matter of copyright policy, it is less tolerable when considered from the vantage of free speech, because the uncertainty can cast a serious chill on communicative activities", Zimmerman, D., "Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights" (1992) 33 Wm. & Mary L. Rev. 665, at p. 709.

¹⁵¹ "Faced with the fuzzed line between idea and expression, would-be speakers, unsure of their rights, might conclude that they are better off bargaining with the copyright owner for permission than risking the costs of litigation, a possible injunction, and an assessment of damages. Once the would-be speaker asks the first author, the first author may, of course, deny the license for any or even for no reason, thereby giving her a degree of control that can extend beyond the technical confines of her actual rights under the statute", Zimmerman, D., "Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights" (1992) 33 Wm. & Mary L. Rev. 665, at p. 709.

¹⁵² At the time Nimmer was writing his article, Congress was considering legislation that would have extended the term of protection for subsisting copyright works for an additional

Amendment as there exists a “definitional balance” between the two sets of rights, copyright’s limited terms being one of the factors contributing to the achievement of such balance. However, he maintained that “a serious question exists as to the constitutional validity of the proposed extension [and the interim extensions], given the countervailing interest in free speech”¹⁵³. He also noted that retrospective copyright term extensions provide no incentive for the creation of new expression¹⁵⁴.

Since Nimmer’s article, the US Congress has, on a number of occasions, lengthened the copyright term for published works and has also provided for the protection of unpublished works. The 1976 Copyright Act set out a general copyright term of the life of the author plus fifty years, both for published and unpublished works. In 1998, Congress extended that term to the life of the author plus seventy years with the passing of the Copyright Term Extension Act (CTEA). In 1999 the landmark case of *Eldred v. Ashcroft*¹⁵⁵ came before the courts. In this case, the plaintiff brought an action challenging the constitutionality of the CTEA. One of the grounds they relied upon was that such an extension interfered with the First Amendment. The Supreme Court rejected Eldred’s challenge and concluded that Congress’s extension of the copyright term did not exceed its powers under the Copyright Clause and did not violate the First Amendment¹⁵⁶.

nineteen years beyond the then term. The proposed legislation was later enacted as part of the 1976 Copyright Act currently in force.

¹⁵³ Nimmer, M.B., “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?”, (1970) 17 UCLA L. Rev. 1180, at 1195.

¹⁵⁴ Netanel, N.W., “Locating Copyright Within the First Amendment Skein” (2001) 54 Stanford L. Rev. 1, at 23-4.

¹⁵⁵ 537 U.S. 186 (2003). The case is widely considered very important in two respects: the extension of the copyright term and the court’s observations regarding the relationship between copyright and free speech. The latter aspect has already been discussed in para. 3.5.3.1. For commentary on the case, see Netanel, N.W., “Locating Copyright Within the First Amendment Skein” (2001) 54 Stanford L. Rev. 1; Chemerinsky, E., “Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional” (2002) 36 Loy. L. A. L. Rev. 82. Cf. Yen, A.C., “Eldred, the First Amendment and Aggressive Copyright Claims” (2003) 40(3) Houston L. Rev. 101.

¹⁵⁶ For a critical analysis of the case’s implications in the area of copyright vis-à-vis free speech, see Birnhack, M.D., “Copyrighting Speech: A Trans-Atlantic View”, in *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (Torremans, P.L.C. (ed.), Kluwer Law International, 2004), 37, at pp. 47-8; Gordon, J.W., “Do We Have a Right to Speak with Another’s Language? *Eldred* and the Duration of Copyright”, in *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (Torremans, P.L.C. (ed.), Kluwer Law International, 2004), 109, at pp. 109-12.

Given these developments, it is difficult to discern how the argument that limited copyright protection promotes freedom of expression holds valid.

5.6 SUMMARY

An argument that has been put forward by courts and legislators alike in both common law and civil law countries is that existing defences, exceptions and limitations to copyright protect the human right of freedom of expression; the way copyright laws of some countries are framed emanates from public interest concerns and thus freedom of expression concerns are inherently protected within the realms of copyright.

Having examined the most frequently cited limitations to copyright, it is debatable whether they do adequately protect freedom of expression. The current situation can probably be accurately summarised using the words of Yen, "It is dangerous to put free speech at the mercy of the idea/expression dichotomy and fair use because those doctrines do not have enough substance to adequately protect something so important"¹⁵⁷.

It is not clear why courts appear so reluctant to consider freedom of expression *per se* as a right that could directly limit or indeed be limited by copyright law. It is equally unclear why courts appear so eager to try to accommodate any such concerns within existing copyright law provisions. Given the increasing rate of litigation involving freedom of expression and, at times, the insurmountable difficulties courts are faced with in giving fully comprehensive rulings in such cases, the right time has arrived for freedom of expression to be evaluated for what it truly is: a universal human right that should be juxtaposed with copyright in its proper character and nature as a human right quite distinct from limitations and exceptions to copyright, none of which expressly refer to the principles of human rights.

¹⁵⁷ Yen, A., "Eldred, the First Amendment and Aggressive Copyright Claims", (2003) 40(3) Houston L. Rev. 101, at 109.

CHAPTER 6

Proposals and Conclusion

6.1 INTRODUCTION

Copyright law does not generally take specific account of freedom of expression. On the international level, the Berne Convention does not recognise freedom of expression as such. The same appears to apply at the regional and national levels.

Courts have not generally subjected private causes of action under copyright law to freedom of expression scrutiny¹. Instead, provisions on limitations and exceptions to copyright have, in some cases, been used as means of taking account of freedom of expression. The fair use/fair dealing defences to copyright infringement have, on a number of occasions, been held to protect a person's freedom of expression right fully and adequately vis-à-vis the author's protection². The principle of idea/expression dichotomy, inherent in copyright jurisprudence and recognised

¹ However, this has not been the case with similar causes of action in other contexts, such as publicity rights and defamation. In these contexts, courts have generally been more willing to exercise freedom of expression scrutiny and uphold freedom of expression arguments. See, *Cardtoons v. Major League Baseball Players Association* 95 F 3d 959, 39 U.S.P.Q. 2d 1865, 1865 (10th Cir, 1996) (the right to free expression of producer of playing cards (plaintiff), in the form of parody baseball trading cards, outweighs the proprietary publicity rights held by the members of the Baseball Players Association (defendants) since justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property, and are an important form of entertainment and social commentary that deserve First Amendment protection); *Hoffman v. Capital Cities/ABC Inc.* 255 F 3d 1180, 59 U.S.P.Q. 2d 1363 (9th Cir, 2001) (a magazine that published, in the context of a feature about Hollywood stars' past and present, a manipulated photograph of actor Dustin Hoffman, giving the impression that he was wearing a contemporary silk gown, was entitled to the full First Amendment protection awarded to non-commercial speech); *New York Times v. Sullivan* 376 US 254 (1964) (the Supreme Court ruled that libel should no longer be treated as immune to First Amendment scrutiny). For a discussion of the relationship between defamation and freedom of expression and relevant case law, see Barendt, Chapter VI, Nimmer, M.B., "The Right to Speak From *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1986) 56 Cal. L. Rev. 935, Wellington, H.H., "On Freedom of Expression" (1979) Yale L. J. 1105.

² For a detailed discussion of this proposition, see para. 5.2.

under the TRIPS Agreement 1994, has also been held to provide effective protection to freedom of expression concerns³.

However, it appears that the current limitations to copyright are not effective means of safeguarding freedom of expression. The thesis has identified a number of gaps in the law despite the existence and application of copyright exceptions. Most importantly, it appears that the courts are reluctant to consider the right of freedom of expression *per se* in the context of copyright law. Judicial decisions discussing even the interrelation between the human right and copyright limitations are comparatively rare⁴.

6.2 MAIN PROPOSALS IN OUTLINE

This Chapter puts forward a number of proposals with a view to ameliorating the present legal landscape. Firstly, it is proposed that the right of freedom of expression receives express recognition within copyright law as opposed to implied recognition through other rights and limitations already in place⁵.

The second proposal flows directly from the suggestion of express recognition of freedom of expression. The right of freedom of expression is a human right and therefore of a universal character; in other words, the right is vested in every individual indiscriminately and without pre-requisite conditions⁶. It is here considered that its character should be reflected in its recognition within the field of copyright law. It is therefore proposed that the principle of non-discrimination⁷ should be introduced within the body of copyright. This proposal aims to render

³ For a detailed discussion of this proposition, see para. 5.4.

⁴ See the conclusions drawn from the respective analyses in Chapters 3, 4 and 5.

⁵ This proposal is discussed further in para. 6.3.

⁶ See Universal Declaration of Human Rights 1948, Preamble, ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"), Article 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty").

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁷ This proposal is discussed further in para. 6.4.

international copyright compliant with another international law, that of human rights, while, at the same time, reflecting the copyright law's own nature and character as a human right⁸.

The thesis puts forward that these proposals are implemented by revising the Berne Convention 1971. The proposition that the Convention is the appropriate implementation forum rests on a number of reasons. These are arguably encapsulated in Ricketson's statement that "the evidence of state practice ... is that, 100 years after the establishment of the Convention, its members continue to subscribe to the basic object of the Convention: the effective and uniform protection of the rights of authors"⁹.

The Convention constitutes the principal international source of copyright law, its Member States being from all continents. The large number of Members reflects the uniform nature of the Convention in its objective of constituting the "ultimate universal codification of copyright"¹⁰.

These attributes of the Berne Convention and its continuing significance in the context of copyright law are reflected in the text of a "solemn declaration" that was made on 9 September 1986 by the Assembly of the Berne Union, recognising that:

" ... copyright is based on human rights and justice and that authors ... deserve that their rights be recognised and effectively protected both in their own country and in all other countries of the world.

... the law of copyright has enriched and will continue to enrich mankind by encouraging intellectual creativity and by serving as an incentive for the

⁸ Universal Declaration of Human Rights 1948, Article 27(2), "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

The nature of copyright as a human right is discussed in para. 2.2.

⁹ See Ricketson S., *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* (Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987), at pp. 892-93.

¹⁰ *Actes de la Conférence internationale pour la protection des Droits d'auteur réunie à Berne du 8 au 19 septembre 1884*, International Office, Berne (1884), 28-29 (debate on the German motion in favour of a universal codification).

dissemination throughout the world of expressions of the arts, learning and information for the benefit of all people,

... international respect for the law of copyright opens paths across frontiers for works of the mind, thus contributing to a better international understanding...;

... the Berne Convention ... by providing an outstanding, comprehensive and harmonised codification of the rights of authors has guaranteed ... the most effective international protection of these rights.”¹¹

For the purposes of the thesis proposals, the “solemn declaration” is of great importance as it constitutes the sole Berne Convention document where member States expressly recognise that copyright is “based on human rights” and constitutes an “incentive for the dissemination of expressions of the arts, learning and information for the benefit of all people”. The original text of the Berne Convention makes no express reference to human rights in general, or freedom of expression in particular. This is also the case with all subsequent revisions of the Convention. However, this declaration illustrates that the Berne Convention is interrelated to the body of human rights, and it is submitted, implies recognition that copyright is a human right itself, thus clearly and unequivocally supporting the proposed revisions of this thesis to the Convention.

In practice, the proposal that the Berne Convention should be brought into line with the Universal Declaration of Human Rights, the principal international source of recognition of human rights, entails that the Convention be revised so as to (i) encompass fundamental principle of non-discrimination underlying the body of human rights, and (ii) incorporate a clause recognising a person's freedom of expression.

It could be argued that as an alternative to the revision of the Berne Convention as a means of the proposals implementation would be an associated Treaty modelled on the WIPO Copyright Treaty 1996. Such Treaty could be said to constitute a more

¹¹ WIPO, “Centenary of the Berne Convention – Celebration of the Hundredth Anniversary of the Berne Convention (Part I)” (1986) 22 Copyright 367. The full original and translated texts of the solemn declaration are set out in Appendix 2.

practical means of achieving the outlined objectives, as the proposed revisions in the Berne Convention would require unanimity in voting¹².

It is submitted that such an alternative would not achieve the envisaged solutions. The reasoning underlying this submission is two-fold. Firstly, the inclusion of the thesis proposals in a Treaty would detract from the pivotal role that the human rights elements in general, and the right of freedom of expression in particular, should occupy within copyright law.

Secondly, the adoption of such a Treaty, unless ratified by all Berne Union States, would clash with the very proposal of non-discrimination. Ratification by some states only would not realise the objective of copyright and the right of freedom of expression being vested in every individual. Rather, application of such a proposal would be confined to the Treaty's limited number of Member States.

Its membership status, uniform nature and sustained value within the realm of copyright law are the principal elements that render the Berne Convention 1971 the appropriate means of implementing the thesis proposals.

6.3 RECOGNITION OF THE RIGHT OF FREEDOM OF EXPRESSION

In the last few decades, human rights laws and individual rights guaranteed under them have been steadily receiving greater recognition. In the context of intellectual property and copyright law in particular, a person's right of freedom of expression has, at times, been increasingly put forward as a competing interest to an author's copyright.

¹² This reasoning appears to be supported by the adoption of the WIPO Treaties 1996 (the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996) regarding the incorporation of the digital agenda into the context of copyright protection. The adoption of the Treaties was favoured over a revision of the Berne Convention, as the latter was considered impractical. In order to amend substantive provisions of the Convention, there must be unanimity of votes cast in a Revision Conference (Berne Convention 1971, Article 27(3)). It was concluded that, given the number of country members of Berne and the diversity of opinions among them, such a requirement would be almost impossible to achieve. For a detailed discussion of the workings of the WIPO Committee Experts in adopting the WIPO Treaties, see Sterling at pp. 705-07.

The response of commentators to such claims has been varied. At one end of the spectrum is the argument that copyright itself is an engine for freedom of expression and that an individual's entitlement to freedom of expression is already accommodated within copyright through existing safety valves preventing authors' over-protection.

At the other end of the spectrum is the argument that the right of freedom of expression is not adequately protected under current principles and provisions of copyright law.

In addition, decisions of different national courts that have been called upon to rule on the relationship between copyright and the human right of freedom of expression are inconsistent. Some countries appear to be more willing to afford protection to freedom of expression over copyright while others are more reluctant. The necessity for consistency is undermined by the fact that the number of cases where individuals invoke their freedom of expression vis-à-vis the author's copyright is steadily increasing, as are the grounds on which the right is invoked.

The Berne Convention contains a number of provisions on the exclusive rights vested in the author of a work as well as on limitations and exceptions to these rights¹³. Limitations and exceptions have the object of setting limits to the author's exclusive rights under the Convention, thus balancing his rights against other potentially competing rights of individuals and the public interest in general.

However the Convention, like other international, regional and national copyright instruments, is silent on the relationship between copyright and freedom of expression.

This phenomenon has led to diversity of opinion, legal inconsistencies and lack of authoritative guidance. It is thus proposed that Article 5(1) of the Convention¹⁴ be

¹³ For a discussion of the provisions on limitations and exceptions under the Berne Convention, see Sterling at pp. 624-26.

¹⁴ Article 5(1) contains the two basic principles of the Convention, namely that protected authors are entitled in respect of their works entitled to national treatment in countries other than the country of origin of the work, and to the specific rights (for example, right of

revised to recognise expressly the right of freedom of expression in cases of alleged copyright infringement. Since the Convention only sets out minimum rights to be adopted by national legislations, the proposal has the additional effect of allowing Member States to decide on the exact scope of the right.

The proposed addition to Article 5(1) reads as follows:

“Whenever an author’s work is used or is to be used by another person, the right of freedom of expression of such other person is to be taken into account in any proceedings concerning the application of the rights granted in accordance with this Convention to the author whose work is so used”¹⁵.

The revision of the Article is designed to promote the balancing of copyright with freedom of expression. This balancing exercise is dual in nature as copyright law belongs not only to the field of intellectual property but to that of human rights as well. Accordingly, the effect of the revised Article 5(1) is to achieve a balance between two separate legal fields on the one hand, and two distinct human rights on the other.

6.4 INTRODUCTION OF THE PRINCIPLE OF NON-DISCRIMINATION

6.4.1 GENERAL

The thesis proposes the introduction of the principle of non-discrimination by extending copyright protection to all authors, irrespective of their nationality, for their works, whether these are published or unpublished.

Articles 3 to 6 of the Berne Convention set out the basic structure of protection under the Convention, identifying the authors who are protected and the level of protection that they are afforded. These provisions concern two distinct issues:

reproduction) granted by the Convention (“Convention rights”). For a discussion of national treatment and Convention rights under Article 5(1), see Sterling at pp. 605-06.

¹⁵ See Annex 1, Article 5(1).

- (a) The categories of authors who are entitled to protection. In order to be protected, authors must comply with the relevant conditions and status criteria established in the Convention¹⁶. (Articles 3, 4 and 6)
- (b) The rights that the protected authors are afforded, the laws that are applied to their works and the concept of a work's country of origin¹⁷. (Article 5)

The following sections examine each of these issues in turn, discussing:

- the current rules applicable under the relevant Articles of the Convention, and any gaps that might exist in the law regarding authors' protection and the determination of a work's country of origin,
- the limitations in the current rules which might render them inconsistent with the principle of non-discrimination, as defined in Article 2 of the Universal Declaration,
- the proposed revisions of the relevant Articles of the Convention, and
- the effects of the proposed revisions

There are (as at February 2006) eighteen countries that are Members of the United Nations and are not Members of the Berne Convention, TRIPS Agreement or the WIPO Copyright Treaty. These countries are Afghanistan, Ethiopia, Iran, Iraq, Kiribati, Lao People's Democratic Republic, Marshall Islands, Nauru, Palau, San Marino, Sao Tome and Principe, Seychelles, Somalia, Timor-Leste, Turkmenistan, Tuvalu, Vanuatu and Yemen. The number of additional authors who would be covered by the non-discrimination principle is thus, in comparison with the number of authors of the other 173 United Nations Members¹⁸, not extensive.

¹⁶ See para. 6.4.2 and Annex 2.

¹⁷ See para. 6.4.3 and Annex 3.

¹⁸ For a list of United Nations Members, see Appendix 3. For a list of Berne Convention, TRIPS Agreement and WIPO Copyright Treaty Members, see Appendix 2.

6.4.2 AUTHORS' PROTECTION¹⁹

6.4.2.1 STATUTORY PROVISIONS UNDER THE BERNE CONVENTION 1971

Under Article 3 of the Berne Convention, protection is afforded to two distinct categories of authors: Union authors²⁰, that is authors who are nationals of one of the countries of the Union, and non-Union authors, that is authors who are nationals of one of the countries outside the Union²¹.

Union authors are protected for their works, whether published²² or unpublished²³. However, non-Union authors are not protected for their unpublished works²⁴, or for their published works unless (by virtue of Article 3(1)(b) of the Convention) they are:

- (a) first published in a Union country²⁵, or
- (b) first published in a non-Union country, with simultaneous publication in a Union country²⁶.

Article 4 of the Convention contains supplementary criteria of entitlement to protection for non-Union authors applicable only to their cinematographic,

¹⁹ Throughout this section, extensive reference is made to Annex 2. The Annex contains analytical tables illustrating all cases of protection of both Union and non-Union authors (the criteria of publication for non-Union authors included) for their literary and artistic works – whether these are published or unpublished – under Article 3 of the Berne Convention (Part A).

The Tables include the additional criteria for protection of cinematographic works (Part B, section 1), works of architecture and certain artistic works (Part B, section 2) by non-Union authors under Article 5(4)(c) of the Berne Convention.

The Tables highlight gaps in the Convention's rules – i.e. those situations where certain non-Union authors are afforded no protection in respect of their works (Part A).

Further, the Tables illustrate the proposed revisions to the current provisions and the effect they will have on authors' protection rules.

²⁰ The category of Union authors embraces authors who are not nationals of a Union country but have their "habitual residence" in one of them. See, Berne Convention, 1971, Article 3(2). For a detailed discussion of the criterion of habitual residence, see Ricketson and Ginsburg at pp. 240-44.

²¹ Berne Convention, 1971, Article 3(1).

²² For the definition of "published works", see Berne Convention, 1971, Article 3(3). For the definition of "simultaneous publication", see Berne Convention, 1971, Article 3(4).

²³ Berne Convention, 1971, Article 3(1)(a). Also, see Annex 2, Part A, cases 1, 3, 5, 7, 9 and 11.

²⁴ See Annex 2, Part A, case 12.

²⁵ See Annex 2, Part A, case 2.

²⁶ See Annex 2, Part A, cases 6 and 8.

architectural and certain artistic works, even if the publication criteria under Article 3(1)(b) are not fulfilled²⁷. Under the Article's provisions:

- (a) Non-Union authors of cinematographic works – whether these are published or unpublished - will be protected provided that the maker of the works has his headquarters or habitual residence in a Union country²⁸.
- (b) Non-Union authors of works of architecture – whether these are published or unpublished – will be protected provided that the works are erected in a Union country²⁹.
- (c) Non-Union authors of certain artistic works incorporated in a building or other structure – whether these are published or unpublished – will be protected provided that the building or other structure they are incorporated in, is located in a Union country³⁰.

Having set out the rules concerning authors' protection, the Convention's approach to protection could be described as selective. The scope of protection of non-Union authors is considerably restricted. There are important cases where non-Union authors are not protected in respect of their works – i.e. unpublished works (other than those conforming to the supplementary criteria)³¹, and works not conforming to the publication criteria³².

6.4.2.2 STATUTORY PROVISIONS UNDER PROPOSED REVISION³³

It is proposed that the Articles of the Berne Convention that guarantee authors' protection be revised in order to afford protection to all authors, irrespective of their

²⁷ Where these works are first published, or simultaneously published in a Union country, the ordinary rules under Article 3, as set out above, shall apply.

²⁸ Berne Convention, 1971, Article 4(a). Also, see Annex 2, Part B, section 1, cases 1, 3 and 5.

²⁹ Berne Convention, 1971, Article 4(b). Also, see Annex 2, Part B, section 2, cases 1, 3 and 5.

³⁰ Berne Convention, 1971, Article 4(b). Also, see Annex 2, Part B, section 2, cases 7, 9 and 11.

³¹ See, Annex 2, Part A, case 12; Part B, section 1, case 6; Part B, section 2, cases 6 and 12.

³² See, Annex 2, Part A, cases 4 and 10; Part B, section 1, cases 2 and 4; Part B, section 2, cases 2, 4, 8 and 10.

³³ This paragraph makes extensive reference to Annex 2. The Annex sets out the proposed revisions to the relevant articles of the Berne Convention. The 1971 Berne text is modified in order to incorporate the thesis proposals. In addition, the effects of the proposals are illustrated in Annex 1.

nationality, of the publication criteria and of the supplementary criteria regarding cinematographic, architectural and certain artistic works.

In order to give effect to the above-mentioned objective, it is proposed that:

- The preamble to the Convention be revised to recognise that all authors should receive protection, irrespective of their nationality or place of publication of their works³⁴.
- Article 3(1) be revised to recognise that all authors should receive protection for the works – whether these are published or unpublished. The distinction made in the provisions of the Article between Union and non-Union authors should thus be removed³⁵.
- Article 6 be deleted. Article 6 deals with the retaliatory measures that may be taken by Union countries against the works of non-Union authors whose countries fail to protect the works of Union authors in an “adequate manner”. Under this proposal, all authors – Union and non-Union alike – would receive protection for their works, thus rendering Article 6 no longer relevant³⁶.

6.4.3 COUNTRY OF ORIGIN³⁷

6.4.3.1 STATUTORY PROVISIONS UNDER THE BERNE CONVENTION 1971

Having examined both the categories of authors and classes of works entitled to protection under the Berne Convention³⁸, this part examines the level of protection

³⁴ See, Annex 1, Preamble.

³⁵ See, Annex 1, Article 3. The effects of the revision of Article 3 are illustrated in Annex 3, Part B.

³⁶ See Annex 1, Article 6. Also, see Annex 1, revised Article 7(8) – for a discussion of the relevance of this Article, see para. 6.4.3.

³⁷ Throughout this section, extensive reference is made to Annex 3. The Annex contains analytical Tables illustrating the rules for determination of the country of origin of literary and artistic works – whether published or unpublished – by both Union and non-Union authors (Part A).

The Tables include the additional criteria for the determination of the country of origin of cinematographic works (Part B, section 1), works of architecture and certain artistic works (Part B, section 2) by non-Union authors.

The Tables highlight gaps in the Convention rules – i.e. situations where no country of origin is provided for works of certain non-Union authors (who, in these instances, are not protected themselves under Articles 3 and 4 of the Convention) (Part A).

Further, the Tables illustrate the proposed revisions of the current provisions and the effect that they will have in relation to the determination of a work’s country of origin.

accorded to authors entitled to protection under Article 5 of the Convention. This involves a discussion of the principle of national treatment³⁹ and the concept of country of origin.

The principle of national treatment is laid down in Articles 5(1) and (3) of the Berne Convention. Under Article 5(1), authors entitled to protection under the Convention shall enjoy, in respect of their works, in Union countries, other than the country of origin, “the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by the Convention”⁴⁰. As far as protection of works in their country of origin is concerned, Article 5(3) states that protection shall be governed by domestic law, with no requirement that the rights specially granted by the Convention are also accorded to these works. This is supplemented by the provision that authors who are not nationals of the country of origin of the protected work, shall enjoy in that country the same rights as national authors⁴¹.

For the purposes of the thesis proposals, the determination of a work’s country of origin is of central importance. Following the proposal that protection under the Convention should be afforded to all authors in respect of their works⁴², it is proposed that the Convention should specify a country of origin for all authors of all classes of works.

Article 5(4) of the Convention sets out the rules for the determination of a work’s country of origin. The rules concerning the determination of the country of origin of works by Union authors can be summarised as follows:

³⁸ Berne Convention, 1971, Articles 3 and 4.

³⁹ In general, under the principle of national treatment, works that originate in one of the Union countries must be treated in each of the other Union countries in the same way that such countries protect their works of their own nationals.

⁴⁰ Note that, under Article 5(2), “the enjoyment and exercise of these rights shall not be subject to any formality”. For a detailed discussion of the meaning of formality, its scope and implications, see Ricketson and Ginsburg at pp. 311-12.

⁴¹ For a detailed discussion of the principle of national treatment under the Berne Convention, see Ricketson and Ginsburg at pp. 309-11.

⁴² See para. 6.4.2.

- (a) In the case of works first published in a Union country, without simultaneous publication in other Union countries, their country of origin is that country⁴³.
- (b) In the case of works first published in a Union country, with simultaneous publication in other Union countries, their country of origin is the country whose legislation grants the shortest term of protection⁴⁴.
- (c) In the case of works first published in a Union country, with simultaneous publication in a non-Union country, their country of origin is the former country⁴⁵.
- (d) In the case of works first published in a non-Union country, without simultaneous publication in a Union country, their country of origin is the country of which the author is a national⁴⁶.
- (e) In the case of unpublished works, their country of origin is the country of which the author is a national⁴⁷.

The rules concerning determination of the country of origin of works by non-Union authors can be summarised as follows:

- (a) In the case of works first published in a Union country, without simultaneous publication in other Union countries, their country of origin is that country⁴⁸.
- (b) In the case of works first published in a Union country, with simultaneous publication in other Union countries, their country of origin is the country whose legislation grants the shortest term of protection⁴⁹.
- (c) In the case of works first published in a Union country, with simultaneous publication in a non-Union country, their country of origin is the former country⁵⁰.

The rules concerning determination of the country of origin of works by non-Union authors have supplementary criteria which are only applicable to cinematographic,

⁴³ Berne Convention, 1971, Article 5(4)(a). Also, see Annex 3, Part A, case 1.

⁴⁴ Berne Convention, 1971, Article 5(4)(a). Also, see Annex 3, Part A, case 5.

⁴⁵ Berne Convention, 1971, Article 5(4)(b). Also, see Annex 3, Part A, case 7.

⁴⁶ Berne Convention, 1971, Article 5(4)(c). Also, see Annex 3, Part A, case 3.

⁴⁷ Berne Convention, 1971, Article 5(4)(c). Also, see Annex 3, Part A, case 11.

⁴⁸ Berne Convention, 1971, Article 5(4)(a). Also, see Annex 3, Part A, case 2.

⁴⁹ Berne Convention, 1971, Article 5(4)(a). Also, see Annex 3, Part A, case 6.

⁵⁰ Berne Convention, 1971, Article 5(4)(b). Also, see Annex 3, Part A, case 8.

architectural and certain artistic works of non-Union authors⁵¹. The current Convention rules for the determination of the country of origin of these classes of works can be summarised as follows:

- (a) In the case of cinematographic works, the maker of which has his headquarters or habitual residence in a Union country, first published in a non-Union country, with or without simultaneous publication in another non-Union country, their country of origin is the country of the headquarters or habitual residence of the maker⁵².
- (b) In the case of unpublished cinematographic works, the maker of which has his headquarters or habitual residence in a Union country, their country of origin is that country⁵³.
- (c) In the case of architectural works erected in a Union country, first published in a non-Union country, with or without simultaneous publication in another non-Union country, their country of origin is the country where the work was erected⁵⁴.
- (d) In the case of unpublished architectural works erected in a Union country, their country of origin is that country⁵⁵.
- (e) In the case of artistic works incorporated in a building or other structure located in a Union country, first published in a non-Union country, with or without simultaneous publication in another non-Union country, their country of origin is the country where the work is located⁵⁶.
- (f) In the case of unpublished artistic works incorporated in a building or other structure located in a Union country, their country of origin is that country⁵⁷.

Since non-Union authors are, in certain cases, excluded from protection under the Convention for their works, there are no provisions for the determination of the

⁵¹ Where these works are first published or simultaneously published in a Union country, the ordinary rules, set out above, apply.

⁵² Berne Convention, 1971, Article 5(4)(c)(i). Also, see Annex 3, Part B, section 1, cases 1 and 3.

⁵³ Berne Convention, 1971, Article 5(4)(c)(i). Also, see Annex 3, Part B, section 1, case 5.

⁵⁴ Berne Convention, 1971, Article 5(4)(c)(ii). Also, see Annex 3, Part B, section 2, cases 1 and 3.

⁵⁵ Berne Convention, 1971, Article 5(4)(c)(ii). Also, see Annex 3, Part B, section 2, case 5.

⁵⁶ Berne Convention, 1971, Article 5(4)(c)(ii). Also, see Annex 3, Part B, section 2, cases 7 and 9.

⁵⁷ Berne Convention, 1971, Article 5(4)(c)(ii). Also, see Annex 3, Part B, section 2, case 11.

country of origin of their works in such cases. These gaps in the law of determination of country of origin (other than in cases where the supplementary criteria apply) can be summarised as follows:

- (a) Works by non-Union authors, first published in a non-Union country, without simultaneous publication in another country⁵⁸.
- (b) Works by non-Union authors, first published in a non-Union country, with simultaneous publication in another non-Union country⁵⁹.
- (c) Unpublished works by non-Union authors⁶⁰.

6.4.3.2 STATUTORY PROVISIONS UNDER PROPOSED REVISION⁶¹

The concept of the country of origin of a work is, *inter alia*, important in determining copyright duration under Articles 5(2) and 7(8) of the Berne Convention. The Convention sets out rules governing the determination of the country of origin for works of Union authors.

In application of the non-discrimination principle, the Convention should be revised in order to provide for a country of origin for works of non-Union authors. All Union authors, in general, receive protection for 50 years pma. As a result of the introduction of additional rules regarding a work's country of origin, if the non-Union country of origin gives, say, 30 years pma protection, the work would receive 50 years pma protection in a Union country; if the non-Union country of origin does not have a copyright law, the work should, if it is submitted, be protected for the life of the author and 50 years pma⁶². These proposals aspire to introduce the principle of non-discrimination to the subject of copyright protection; all countries, Union and non-Union alike, will, as a result, protect the works of all authors for a minimum term of the life of the author and 50 years pma.

⁵⁸ See Annex 3, Part A, case 4.

⁵⁹ See Annex 3, Part A, case 10.

⁶⁰ See Annex 3, Part A, case 12.

⁶¹ This paragraph makes extensive reference to Annex 1. The Annex sets out the proposed revisions to the relevant Articles of the Berne Convention. The 1971 text is modified in order to incorporate the thesis proposals. In addition, the effects of the proposals are illustrated in Annex 3.

⁶² See Annex 1, revised Article 7(8) of the Berne Convention.

It is thus proposed that the provisions under Article 5 of the Berne Convention concerning determination of the country of origin of authors' works are revised in order to fill in the gaps under the current rules. In addition, the revisions will reflect the human rights principle of non-discrimination.

In order to give effect to the above-mentioned objectives, it is proposed that:

- Article 5(4) be revised to provide that, in the case of works by non-Union authors, first published in a non-Union country, without simultaneous publication in a Union country, their country of origin shall be the non-Union country⁶³.
- Article 5(4) be revised to provide that, in the case of works by non-Union authors, first published in a non-Union country, with simultaneous publication in several non-Union countries which grant different terms of protection, their country of origin shall be the country whose legislation grants the shortest term of protection⁶⁴, with a minimum term of 50 years pma⁶⁵.
- Article 5(4) be revised to provide that in the case of unpublished works by non-Union authors, their country of origin shall be the country of which the author is a national⁶⁶.
- All authors of cinematographic, architectural and artistic works will be protected for these works. Union authors will be protected on the basis of the respective conditions relating to the headquarters or habitual residence of the maker and the location of the work, as set out in Article 5(4)(c)(i) and (ii)⁶⁷. Non-Union authors will be protected on the basis of the non-discrimination rule⁶⁸.

⁶³ See Annex 1, Article 5(5)(b). Also, see Annex 3, Part A, case 4.

⁶⁴ See Annex 1, Article 5(5)(d). Also, see Annex 3, Part A, case 10.

⁶⁵ In cases where the country of origin provides for a shorter term of protection or makes no such provision due to the absence of a copyright/author's right law. See further proposed revisions to Article 7(8) of the Convention.

⁶⁶ See Annex 1, Article 5(5)(f). Also, see Annex 3, Part A, case 12.

⁶⁷ Article 5(5)(e)(i) and (ii), under the proposed revision (see, Annex 1). The effects of this revision are illustrated in Annex 2, Part B, section 1, cases 1, 3 and 5; Part B, section 2, cases 1, 3, 5, 7, 9 and 11.

⁶⁸ Article 5(4)(c), (d) and (f), under the proposed revision (see, Annex 1). The effect of this revision are illustrated in Annex 2, Part B, section 1, cases 2, 4 and 6; Part B, section 2, cases 2, 4, 6, 8, 10 and 12.

- Article 5(3) be revised to additionally provide that where the country of origin of a work is a non-Union country, the Article's provisions relating to national treatment shall not extend to such a country.
- Article 7(8) be revised to additionally provide that where the country of origin of a work is a non-Union country which has no copyright law, the protection afforded under the Convention shall last for the life of the author and 50 years pma⁶⁹.

6.5 SUMMARY OF PROPOSALS

The thesis proposals can be viewed as offering new avenues for the application of the law on copyright.

At the time of the drafting the Berne Convention, it was argued that the restrictions that are found in it concerning the inconsistent treatment of Union and non-Union authors were put in place with the belief that they would act as an incentive for countries to join Berne. At the present time, some hundred and twenty years later, the Berne Convention is the "ultimate universal codification of copyright" with most of the countries in the world having joined the Convention. The proposed introduction of the principle of non-discrimination, in the sense of Article 2 of the Universal Declaration of Human Rights, has a two-fold effect. It acts as a means of demonstrating that the Convention is now shifting forward from its original aspirations, having achieved them. Affording non-discriminatory protection to all authors, irrespective of their nationality, highlights the uniform nature and appeal of the Convention.

The thesis proposal of express recognition of the right of freedom of expression in copyright law not only resolves the inconsistencies and grey areas that exist but accentuates the importance of human rights in the application of the Berne Convention. By introducing the human right of freedom of expression within the realm of copyright law, the two otherwise different sets of rights are both seen in the perspective of, and as balancing two equally important human rights.

⁶⁹ The proposed revisions apply to works of authors of non-Union countries that are not pre-existing works.

6.6 CONCLUSION

The primary aim of this thesis has been to examine and evaluate the relationship between the rights vested in the author of a work under copyright law and the human right of freedom of expression which is vested in every individual. This analysis has been carried out on a comparative basis. The provisions under the relevant copyright and human rights instruments, agreements, treaties, conventions and laws have been identified and examined on the international, regional and national levels. Relevant jurisprudence and judicial precedents have been analysed in detail. In this context, the main economic and moral rights of the author have been juxtaposed against another party's right of freedom of expression. In addition, the main defences, exceptions and limitations to copyright law have been examined in order to ascertain the extent to which they impact on the scope of the author's various rights.

The primary objective underlying this analysis has been the identification of areas of actual and potential conflicts between copyright and freedom of expression. In particular, the identification of the boundaries between the two sets of rights, the identification of grey areas in the context of their interaction, the identification of conflicts that may exist but are alleviated through provisions limiting copyright and most importantly, the identification of current and foreseeable conflicts that have not been addressed by legislatures and courts alike, that have consequently been left unresolved and which can endanger the effective protection of the respective rights have been presented.

The analysis carried out in the thesis appears to suggest that the relationship between the rights can be controversial. Conflicts can and do arise between moral rights and freedom of expression and economic rights and freedom of expression alike. Tensions in their respective interactions can be identified. It is submitted that such tensions and conflicts are not always resolved in a satisfactory manner, while at times courts are reluctant even to acknowledge their existence. On a number of occasions, courts have not been willing to upset the balance that they assume they have to date struck between the rights. Their approach to freedom of expression claims can, at times, be anachronistic. However, given the growing importance of the body of human rights they seem that they are being forced to reconsider their

interpretation. This realisation is relatively recent and therefore there are as yet no marked changes in their approach. Different laws and national courts evolve with different speeds and through the development of diverse principles and rules. This results in further lack of uniformity.

In order to resolve these problems the thesis has proposed the express recognition of the right of freedom of expression in the context of international copyright law, in particular the Berne Convention. The international nature of the proposal intends to achieve two objectives:

- The realisation of uniformity in the recognition of the right. The Berne Convention sets minimum standards of copyright protection. Consequently, national legislatures can assess and determine the precise scope of the right within their respective copyright laws and ultimately implement their individual provisions.
- The attribution of a truly universal nature to copyright law. Freedom of expression is a universal human right and its recognition within the realm of the Berne Convention will result in every individual being vested with this right. Equally, every author of a work should be vested with the economic and moral rights that comprise copyright. Thus the thesis has proposed that the Convention is further amended to recognise that each and every author is attributed with copyright in his creation.

In 1986, on the centenary of the Berne Convention, the Assembly of the Berne Union signed a Solemn Declaration unequivocally declaring that copyright is based on human rights. This thesis has intended to illustrate that this Declaration should be fully realised in modern copyright law. Today, at the twentieth year anniversary of this Declaration, time has come to give effect, in the Berne Convention itself, to the Declaration's recognition of copyright as a human right, relevance to it of freedom of expression and ultimate balancing of the rights.

ANNEXES TO CHAPTER 6

ANNEX 1: Comparative Table; Berne Convention and Proposed Revisions

ANNEX 2: Author's Protection – Effect of Proposals

ANNEX 3: Country of Origin – Effect of Proposals

ANNEX 1

Comparative Table; Berne Convention and Proposed Revisions

The following is a comparative table setting out extracts from the provisions of the Berne Convention 1971, as amended 1979, and the proposed revisions

<u>Berne Convention Text</u>	<u>Proposed Revisions</u> [Proposed Amendments shown in bold]
<p>The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,</p> <p>Recognizing the importance of the work of the Revision Conference held at Stockholm in 1967,</p>	<p>The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,</p> <p>Recognizing the importance of the work of the Revision Conference held at Stockholm in 1967,</p> <p>Recognizing that all authors, irrespective of their nationality or place of publication of their works, should receive protection,</p> <p>Recognizing the importance of human rights in general, and the importance of the right of freedom of expression as provided in the Universal Declaration of Human Rights, in particular,</p>
<p>Have resolved to revise the Act adopted by the Stockholm Conference, while maintaining without change Articles 1 to 20 and 22 to 26 of that Act.</p>	<p>Have resolved to revise the Act adopted by the Stockholm Conference, while maintaining without change Articles 1 to 20 and 22 to 26 of that Act.</p>

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

Article 1

Establishment of a Union

Article 2

Protected Works

Article 2bis

Possible Limitation of Protection of Certain Works

Article 3

Criteria of Eligibility for Protection

(1) The protection of this Convention shall apply to:

- (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;
- (b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

Article 1

Establishment of a Union

No change.

Article 2

Protected Works

No change.

Article 2bis

Possible Limitation of Protection of Certain Works

No change.

Article 3

Criteria of Eligibility for Protection

(1) The protection of this Convention shall apply to **all authors for their works, whether published or not.**

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.

(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

Article 4

Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.

(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

Article 4

Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works

No change.

Article 5

Rights Guaranteed

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is

Article 5

Rights Guaranteed

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Whenever an author's work is used or is to be used by another person, the right of freedom of expression of such other person is to be taken into account in any proceedings concerning the application of the rights granted in accordance with this Convention to the author whose work is so used.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is

protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

- (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
- (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
- (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
 - (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

protected under this Convention, he shall enjoy in that country the same rights as national authors.

Where the country of origin is a non-Union country, the provisions of the second sentence of this Article shall not extend to that country.

(4) The country of origin shall be considered to be:

- (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
- (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
- (c) in the case of works by a non-Union national first published in a country outside the Union, without simultaneous publication in a country of the Union, that country;
- (d) in the case of works by a non-Union national published simultaneously in several countries outside the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
- (e) in the case of unpublished works or

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

- (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
- (ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

(f) in the case of unpublished works by a non-Union national, the country of which the author is a national.

Article 6

Possible Restriction of Protection in Respect of Certain Works of Nationals of

Article 6

Possible Restriction of Protection in Respect of Certain Works of Nationals of

Certain Countries Outside the Union

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General") by a written declaration specifying the countries in regard to which protection is restricted, and the restrictions to which rights of authors who are nationals of those countries are

Certain Countries Outside the Union

Deleted

subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

Article 6bis
Moral Rights

Article 7
Term of Protection

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-

Article 6bis
Moral Rights
No change.

Article 7
Term of Protection

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-

mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present

mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present

Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Articles 8 – 38 and Appendix

Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work, **but where the country of origin is not a member of the Union, the term shall not be less than that provided in the foregoing paragraphs.**

Articles 8 – 38 and Appendix

No change.

ANNEX 2

Authors' Protection – Effect of Proposals

Part A

Protection of Literary and Artistic Works¹ under the Berne Convention

Under the proposed revision of the Berne Convention, non-Union authors, like Union authors, will receive protection for their published works – wherever these are first published or simultaneously published – and for their unpublished works (cf. Berne, Article 3).

[Cases of additional protection resulting from the proposals are shown in bold.]

Nationality of Author	Published Work		Unpublished Work	Protection under Berne 1971	Protection under Proposed Revision
	Place of First Publication	Places of Simultaneous Publication			
1 National of a Union Country (British)	Any Union Country (France)	–	–	Protected (Art.3(1)(a))	Protected (Art.3(1))
2 National of a Non-Union Country (Urbanian)	Any Union Country (France)	–	–	Protected (Art.3(1)(b))	Protected (Art.3(1))
3 National of a Union Country (British)	Any Non-Union Country (Ruritania)	–	–	Protected (Art.3(1)(b))	Protected (Art.3(1))
4 National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	–	–	Not Protected	Protected (Art.3(1))

5	National of a Union Country (British)	Any Union Country (France)	Any Union Country (Germany)	—	Protected (Art.3(1)(a))	Protected (Art.3(1))
6	National of a Non-Union Country (Urbanian)	Any Union Country (France)	Any Union Country (Germany)	—	Protected (Art.3(1)(b))	Protected (Art.3(1))
7	National of a Union Country (British)	Any Union Country (France)	Any Non-Union Country (Ruritania)	—	Protected (Art.3(1)(a))	Protected (Art.3(1))
8	National of a Non-Union Country (Urbanian)	Any Union Country (France)	Any Non-Union Country (Ruritania)	—	Protected (Art.3(1)(b))	Protected (Art.3(1))
9	National of a Union Country (British)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	Protected (Art.3(1)(a))	Protected (Art.3(1))
10	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	Not Protected	Protected (Art.3(1))
11	National of a Union Country (British)	—	—	Unpublished Work	Protected (Art.3(1)(a))	Protected (Art.3(1))
12	National of a Non-Union Country (Urbanian)	—	—	Unpublished Work	Not Protected	Protected (Art.3(1))

Part B

Protection of Cinematographic, Architectural and Other Artistic Works; Supplementary Berne Criteria Concerning Authors Not Covered under Article 3(1)(a)

Section 1 – Cinematographic Works

Under the proposed revision of the Berne Convention, non-Union authors of cinematographic works will receive protection for their published works – wherever these are first published or simultaneously published – and for their unpublished works, irrespective of the location of the maker.

[Cases of additional protection resulting from the proposals are shown in bold.]

Headquarters/ Habitual Residence of Maker	Published Work		Unpublished Work	Protection under Berne 1971	Protection under Proposed Revision
	Place of First Publication	Places of Simultaneous Publication			
1 Any Union Country (UK)	Any Non-Union Country (Ruritania)	–	–	Protected (Art.4(a))	Protected (Art.3(1))
2 Any Non- Union Country (Arcadia)	Any Non-Union Country (Ruritania)	–	–	Not Protected	Protected (Art.3(1))
3 Any Union Country (UK)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	–	Protected (Art.4(a))	Protected (Art.3(1))
4 Any Non- Union Country (Arcadia)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	–	Not Protected	Protected (Art.3(1))

5	Any Union Country (UK)	–	–	Unpublished Work	Protected (Art.4(a))	Protected (Art.3(1))
6	Any Non- Union Country (Arcadia)	–	–	Unpublished Work	Not Protected	Protected (Art.3(1))

Section 2 – Architectural and Other Artistic Works

Under the proposed revision of the Berne Convention, non-Union authors of works of architecture and artistic works incorporated in a building (or other structure) will receive protection for their published works – wherever these are first published or simultaneously published – and for their unpublished works, irrespective of the location of the works.

[Cases of additional protection resulting from the proposals are shown in bold.]

Type and Location of Work	Published Work		Unpublished Work	Protection under Berne 1971	Protection under Proposed Revision
	Place of First Publication	Places of Simultaneous Publication			
1 Work of Architecture Erected in a Union Country (UK)	Any Non-Union Country (Ruritania)	–	–	Protected (Art.4(b))	Protected (Art.3(1))
2 Work of Architecture Erected in a Non-Union Country (Arcadia)	Any Non-Union Country (Ruritania)	–	–	Not Protected	Protected (Art.3(1))
3 Work of Architecture Erected in a Union Country (UK)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	–	Protected (Art.4(b))	Protected (Art.3(1))
4 Work of Architecture Erected in a Non-Union Country (Arcadia)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	–	Not Protected	Protected (Art.3(1))
5 Work of Architecture Erected in a Union Country (UK)	–	–	Unpublished Work	Protected (Art.4(b))	Protected (Art.3(1))

6	Work of Architecture Erected in a Non-Union Country (Arcadia)	—	—	Unpublished Work	Not Protected	Protected (Art.3(1))
7	Artistic Work Incorporated in a Building/ Other Structure in a Union Country (UK)	Any Non-Union Country (Ruritania)	—	—	Protected (Art.4(b))	Protected (Art.3(1))
8	Artistic Work Incorporated in a Building/Other Structure in a Non-Union Country (Arcadia)	Any Non-Union Country (Ruritania)	—	—	Not Protected	Protected (Art.3(1))
9	Artistic Work Incorporated in a Building/ Other Structure in a Union Country (UK)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	Protected (Art.4(b))	Protected (Art.3(1))
10	Artistic Work Incorporated in a Building/Other Structure in a Non-Union Country (Arcadia)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	Not Protected	Protected (Art.3(1))
11	Artistic Work Incorporated in a Building/ Other Structure in a Union Country (UK)	—	—	Unpublished Work	Protected (Art.4(b))	Protected (Art.3(1))

12	Artistic Work Incorporated in a Building/Other Structure in a Non-Union Country (Arcadia)	—	—	Unpublished Work	Not Protected	Protected (Art.3(1))
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¹ The term “literary and artistic works” is used here in the broad sense of Article 2(1) of the Berne Convention, including, as well as literary and artistic works, dramatic and musical works, cinematographic works and works of architecture etc.

ANNEX 3

Country of Origin – Effect of Proposals¹

Part A

Country of Origin under the Berne Convention: Literary and Artistic Works²

Under the proposed revision of the Berne Convention, all works of non-Union authors, like Union authors, will have a country of origin, whether published – wherever these are first published or simultaneously published – or unpublished (cf. Berne, Article 5(4)).

[Cases of additional allocations of country of origin resulting from the proposals are shown in bold.]

Nationality of Author	Published Work		Unpublished Work	Country of Origin under Berne 1971	Country of Origin under Proposed Revision
	Place of First Publication	Places of Simultaneous Publication			
1 National of a Union Country (British)	Any Union Country (France)	–	–	France (Art.5(4)(a))	France (Art.5(4)(a))
2 National of a Non-Union Country (Urbanian)	Any Union Country (France)	–	–	France (Art.5(4)(a))	France (Art.5(4)(a))
3 National of a Union Country (British)	Any Non-Union Country (Ruritania)	–	–	UK (Art.5(4)(c))	UK (Art.5(4)(e))
4 National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	–	–	No Specific Provision (work unprotected)	Ruritania (work protected) (Art.5(4)(b))/ (Art.7(8))

5 *	National of a Union Country (British)	Any Union Country (France (70 years pma))	Any Union Country (China (50 years pma))	—	China (Country with Shortest Term of Protection) (Art.5(4)(a))	China (Country with Shortest Term of Protection) (Art.5(4)(a))
6	National of a Non-Union Country (Urbanian)	Any Union Country (France (70 years pma))	Any Union Country (China (50 years pma))	—	China (Country with Shortest Term of Protection) (Art.5(4)(a))	China (Country with Shortest Term of Protection) (Art.5(4)(a))
7	National of a Union Country (British)	Any Union Country (France)	Any Non-Union Country (Ruritania)	—	France (Art.5(4)(b))	France (Art.5(4)(c))
8	National of a Non-Union Country (Urbanian)	Any Union Country (France)	Any Non-Union Country (Ruritania)	—	France (Art.5(4)(b))	France (Art.5(4)(c))
9	National of a Union Country (British)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	UK (Art.5(4)(c))	UK (Art.5(4)(e))
10	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	No Specific Provision (work unprotected)	Country with Shortest Term of Protection (Art.5(4)(d))/ (Art.7(8))
11	National of a Union Country (British)	—	—	Unpublished Work	UK (Art.5(4)(c))	UK (Art.5(4)(e))
12	National of a Non-Union Country (Urbanian)	—	—	Unpublished Work	No Specific Provision (work unprotected)	Urbania (Art.5(4)(f))/ (Art.7(8))

* Note

It appears that the rules of the Berne Convention do not cover the case where works are simultaneously published in Union countries which grant the same term of protection.

Ricketson points out that this constitutes a gap in the Convention rules and argues that "the view of Nordemann *et al* that there are two countries of origin, in this situation, must be correct". See Ricketson at para. 5.72.

For a detailed discussion of this gap in the law and the possible solutions that have been put forward, see Nordemann, W., Vinck, K., and Hertin, P. W., *Internationales Urheberrecht und Leistungsschutzrecht der deutschsprachigen Länder unter Berücksichtigung auch der Staaten der Europäischen Gemeinschaft, Kommentar*, Werner, Düsseldorf (1977) at 60.

Other special problems relating to the identification of the country of origin (e.g. where there is a change of nationality) are also considered in Ricketson, at paras. 5.72-5.81, but are not considered here.

Part B

Country of Origin: Cinematographic, Architectural and Other Artistic Works; Supplementary Berne Criteria

Section 1 – Cinematographic Works

Under the proposed revision of the Berne Convention, cinematographic works of non-Union authors will have a country of origin, whether published – wherever these are first published or simultaneously published – or unpublished, irrespective of the location of the maker (cf. Berne, Article 5(4)(c)).

In the case where the country of origin of a cinematographic work does not protect such a work, or protects it for less than 50 years pma, the provisions under revised Article 7(8) of the Berne Convention shall apply.

Assume that interpretation of Articles 3(1), 4 and 5(4) of the Berne Convention is that if the author of a Union work is a Union national, the rules of Part A will apply.

[Cases of additional allocations of country of origin resulting from the proposals are shown in bold.]

Nationality of Author	Headquarters/Habitual Residence of Maker	Published Work		Unpublished Work	Country of Origin under Berne 1971	Country of Origin under Proposed Revision
		Place of First Publication	Places of Simultaneous Publication			
1 National of a Non-Union Country (Urbanian)	Any Union Country (UK)	Any Non-Union Country (Ruritania)	–	–	UK (Art.5(4)(c)(i))	UK (Art.5(4)(e)(i))
2 National of a Non-Union Country (Urbanian)	Any Non-Union Country (Arcadia)	Any Non-Union Country (Ruritania)	–	–	No Specific Provision (work unprotected)	Ruritania (work protected) (Art.5(4)(c))

3	National of a Non- Union Country	Any Union Country	Any Non-Union Country	Any Non-Union Country	—	UK	UK
	(Urbanian)	(UK)	(Ruritania (70 years pma))	(Atlantia (50 years pma))		(Art.5(4)(c)(i))	(Art.5(4)(e)(i))
4	National of a Non- Union Country	Any Non- Union Country	Any Non- Union Country	Any Non- Union Country	—	No specific Provision (work unprotected)	Atlantia (Country with Shortest Term of Protection) (work protected)
	(Urbanian)	(Arcadia)	(Ruritania (70 years pma))	(Atlantia (50 years pma))			(Art.5(4)(d))
5	National of a Non- Union Country	Any Union Country	—	—	Unpubli- shed Work	UK	UK
	(Urbanian)	(UK)				(Art.5(4)(c)(i))	(Art.5(4)(e)(i))
6	National of a Non- Union Country	Any Non- Union Country	—	—	Unpubli- shed Work	No specific Provision (work unprotected)	Urbania (work protected)
	(Urbanian)	(Arcadia)					(Art.5(4)(f))

Section 2 – Architectural and Other Artistic Works

Under the proposed revision of the Berne Convention, works of architecture and artistic works incorporated in a building (or other structure) by non-Union authors will have a country of origin, whether published – wherever these are first published or simultaneously published – or unpublished, irrespective of their location (cf. Berne, Article 5(4)(c)).

In the case where the country of origin of a work of architecture or artistic work incorporated in a building (or other structure) does not protect such a work, or protects it for less than 50 years pma, the provisions under revised Article 7(8) of the Berne Convention shall apply.

Assume that interpretation of Articles 3(1), 4 and 5(4) of the Berne Convention is that if the author of a Union work is a Union national, the rules of Part A will apply.

[Cases of additional allocations of country of origin resulting from the proposals are shown in bold.]

Type and Location of Work	Nationality of Author	Published Work		Unpublished Work	Country of Origin under Berne 1971	Country of Origin under Proposed Revision
		Place of First Publication	Places of Simultaneous Publication			
1 Work of Architecture Erected in a Union Country (UK)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	–	–	UK (Art.5(4)(c)(ii))	UK (Art.5(4)(e)(ii))
2 Work of Architecture Erected in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	–	–	No Specific Provision (work unprotected)	Ruritania (work protected) (Art.5(4)(c))
3 Work of Architecture Erected in a Union Country (UK)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	–	UK (Art.5(4)(c)(ii))	UK (Art.5(4)(e)(ii))

4 Work of Architecture Erected in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania (70 years pma))	Any Non-Union Country (Atlantia (50 years pma))	—	No Specific Provision (work unprotected)	Atlantia (Country with Shortest Term of Protection) (work protected) (Art.5(4)(d))
5 Work of Architecture Erected in a Union Country (UK)	National of a Non-Union Country (Urbanian)	—	—	Unpublished Work	UK (Art5(4)(c)(ii))	UK (Art.5(4)(e)(ii))
6 Work of Architecture Erected in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	—	—	Unpublished work	No Specific Provision (work unprotected)	Urbania (work protected) (Art.5(4)(f))
7 Artistic Work Incorporated in a Building/ Other Structure in a Union Country (UK)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	—	—	UK (Art.5(4)(c)(ii))	UK (Art.5(4)(e)(ii))
8 Artistic Work Incorporated in a Building/ Other Structure in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	—	—	No Specific Provision (work unprotected)	Ruritania (work protected) (Art.5(4)(c))
9 Artistic Work Incorporated in a Building/Other Structure in a Union Country (UK)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania)	Any Non-Union Country (Atlantia)	—	UK (Art.5(4)(c)(ii))	UK (Art.5(4)(e)(ii))

10	Artistic Work Incorporated in a Building/ Other Structure in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	Any Non-Union Country (Ruritania (70 years pma))	Any Non-Union Country (Atlantia (50 years pma))	—	No Specific Provision (work unprotected)	Atlantia (Country with Shortest Term of Protection) (work protected) (Art.5(4)(d))
11	Artistic Work Incorporated in a Building/Other Structure in a Union Country (UK)	National of a Non-Union Country (Urbanian)	—	—	Unpublished Work	UK (Art.5(4)(c)(ii))	UK (Art.5(4)(e)(ii))
12	Artistic Work Incorporated in a Building/ Other Structure in a Non-Union Country (Arcadia)	National of a Non-Union Country (Urbanian)	—	—	Unpublished work	No Specific Provision (work unprotected)	Urbania (work protected) (Art.5(4)(f))

¹ The Tables do not cover situations of works of joint authorship. For a discussion of such works in the present context, see Ricketson at para. 5.72.

² The term “literary and artistic works” is used here in the broad sense of Article 2(1) of the Berne Convention, including, as well as literary and artistic works, dramatic and musical works, cinematographic works and works of architecture etc.

APPENDICES

**APPENDIX 1: “Solemn Declaration” by the Assembly of the Berne Union of 9
September 1986**

**APPENDIX 2: Table of Membership of International Copyright and Human Rights
Instruments**

APPENDIX 3: Table of Membership of Regional Human Rights Instruments

APPENDIX 1

“Solemn Declaration” by the Assembly of the Berne Union of 9 September 1986

I. Original Textⁱ

“Les Etats membres de l’Assemblée de l’Union internationale pour la protection des oeuvres littéraires et artistiques (Union de Berne),

“Convoqués en session extraordinaire par le Directeur général de l’Organisation Mondiale de la Propriété Intellectuelle pour célébrer le centième anniversaire de l’adoption de la Convention de Berne pour la protection des oeuvres littéraires et artistiques, signée le 9 septembre 1886,

“Réunis, à l’invitation du Conseil fédéral de la Confédération suisse au Palais fédéral à Berne, sur les lieux mêmes où la Convention de Berne a été adoptée et signée un siècle plus tôt,

“S’inspirant de l’enthousiasme, de l’imagination, de la sagesse et du discernement des gouvernements et des individus dont les efforts ont donné naissance à la Convention de Berne,

“Honorant la mémoire de tous ceux qui ont contribué à la modernisation constante de la Convention de Berne, grâce aux sept révisions effectuées au cours des cent dernières années,

“Renouvelant leur engagement de protéger les droits des auteurs d’une façon aussi efficace et aussi uniforme que possible:

“Déclarent solennellement que le droit d’ auteur se fonde sur les droits de l’ homme et sur la justice et que les auteurs, en tant que créateurs de beauté, de divertissement et de connaissances, méritent que leurs droits sur leurs créations soient reconnus et efficacement protégés aussi bien dans leur propre pays que dans tous les autres pays du monde,

“Déclarent solennellement que le droit d’ auteur a contribué et continue de contribuer à l’ épanouissement de l’ humanité en encourageant la créativité intellectuelle et en stimulant la dissémination à travers le monde des expressions de l’ art, du savoir et de l’ information pour le bénéfice de tous,

“Déclarent solennellement que le respect international du droit d’ auteur ouvre les frontières aux oeuvres de l’ esprit, contribuant ainsi à promouvoir une meilleure compréhension internationale et à faire avancer la cause de la paix,

“Déclarent solennellement que la Convention de Berne pour la protection des oeuvres littéraires et artistiques, en offrant une excellente codification complète et harmonisée des droits des auteurs, a garanti depuis cent ans la protection internationale la plus efficace de ces droits,

“S’ engagent à continuer d’ oeuvrer ensemble pour sauvegarder les droits des auteurs contre toutes formes de piraterie et autres actes illicites et pour assurer une application effective de ces droits dans le cadre des nouvelles possibilités de communication entre les auteurs et le public engendrées par le progrès économique, social, scientifique et technique,

“Invitent instamment tous les Etats qui ne l’ ont pas encore fait à se joindre à eux en adhérant à la Convention de Berne pour la protection des oeuvres littéraires et artistiques.”

II. Translated Text¹¹

"The States members of the Assembly of the International (Berne) Union for the Protection of Literary and Artistic Works,

"Convened in an extraordinary session by the Director General of the World Intellectual Property Organization in order to commemorate the hundredth anniversary of the adoption of the Berne Convention for the Protection of Literary and Artistic Works, signed on September 9, 1886,

"Meeting, at the invitation of the Federal Council of the Swiss Confederation in the Palais fédéral, in Berne, in the same place where the Berne Convention was adopted and signed a century ago,

"Inspired by the enthusiasm, imagination, wisdom and foresight of those Governments and those individuals whose efforts brought the Berne Convention into existence,

"Paying tribute to the memory of all those who contributed to the constant modernization, through the seven revisions that took place in the last hundred years, of the Berne Convention,

"Reaffirming their commitment to protect the rights of authors in as effective and uniform a manner as possible:

"Solemnly declare that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their own country and in all other countries of the world;

"Solemnly declare that the law of copyright has enriched and will continue to enrich mankind by encouraging intellectual creativity and by serving as an incentive for the dissemination throughout the world of expressions of the arts, learning and information for the benefit of all people;

“Solemnly declare that international respect for the law of copyright opens paths across frontiers for works of the mind, thus contributing to a better international understanding and to the cause of peace;

“Solemnly declare that the Berne Convention for the Protection of Literary and Artistic Works, by providing an outstanding, comprehensive and harmonized codification of the rights of authors, has guaranteed for a hundred years the most effective international protection of those rights;

“Pledge themselves to continue to work together to safeguard the rights of authors against all forms of piracy and other unlawful acts and to ensure the effective application of those rights in the framework of new opportunities for communication between authors and the public created by economic, social, scientific and technological progress;

“Urge all States that so far have not done so to join them by adhering to the Berne Convention for the Protection of Literary and Artistic Works.”

ⁱ WIPO, “Centenaire de la Convention de Berne – Cérémonies du centième anniversaire de la Convention de Berne (Première Partie)” (1986) 22 Droit d’Auteur 367.

ⁱⁱ WIPO, “Centenary of the Berne Convention – Celebration of the Hundredth Anniversary of the Berne Convention (Part I)” (1986) 22 Copyright 367.

APPENDIX 2

Table of Membership of International Copyright and Human Rights Instruments

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Afganistan		✓	✓	
Albania	✓	✓	✓	✓
Algeria	✓	✓	✓	
Andorra	✓	✓	✓	
Angola		✓	✓	✓
Antigua and Barbuda	✓	✓		✓
Argentina	✓	✓	✓	✓
Armenia	✓	✓	✓	✓
Australia	✓	✓	✓	✓
Austria	✓	✓	✓	✓
Azerbaijan	✓	✓	✓	
Bahamas	✓	✓		
Bahrain	✓	✓		✓
Bangladesh	✓	✓	✓	✓
Barbados	✓	✓	✓	✓
Belarus	✓	✓	✓	
Belgium	✓	✓	✓	✓
Belize	✓	✓	✓	✓
Benin	✓	✓	✓	✓
Bhutan	✓	✓		
Bolivia	✓	✓	✓	✓
Bosnia and Herzegovina	✓	✓	✓	
Botswana	✓	✓	✓	✓
Brazil	✓	✓	✓	✓
Brunei Darussalam		✓		✓
Bulgaria	✓	✓	✓	✓
Burkina Faso	✓	✓	✓	✓
Burundi		✓	✓	✓

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Cambodia		✓	✓	✓
Cameroon	✓	✓	✓	✓
Canada	✓	✓	✓	✓
Cape Verde	✓	✓	✓	
Central African Republic	✓	✓	✓	✓
Chad	✓	✓	✓	✓
Chile	✓	✓	✓	✓
China	✓	✓	✓	✓
Colombia	✓	✓	✓	✓
Comoros	✓	✓		
Congo	✓	✓	✓	✓
Costa Rica	✓	✓	✓	✓
Côte d' Ivoire	✓	✓	✓	✓
Croatia	✓	✓	✓	✓
Cuba	✓	✓		✓
Cyprus	✓	✓	✓	✓
Czech Republic	✓	✓	✓	✓
Democratic People's Republic of Korea	✓	✓	✓	
Democratic Republic of the Congo	✓	✓	✓	✓
Denmark	✓	✓	✓	✓
Djibouti	✓	✓	✓	✓
Dominica	✓	✓	✓	✓
Dominican Republic	✓	✓	✓	✓
Ecuador	✓	✓	✓	✓
Egypt	✓	✓	✓	✓
El Salvador	✓	✓	✓	✓
Equatorial Guinea	✓	✓	✓	
Eritrea		✓	✓	✓
Estonia	✓	✓	✓	✓
Ethiopia		✓	✓	
Fiji	✓	✓		✓
Finland	✓	✓	✓	✓
France	✓	✓	✓	✓
Gabon	✓	✓	✓	✓
Gambia	✓	✓	✓	✓
Georgia	✓	✓	✓	✓
Germany	✓	✓	✓	✓

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Ghana	✓	✓	✓	✓
Greece	✓	✓	✓	✓
Grenada	✓	✓	✓	✓
Guatemala	✓	✓	✓	✓
Guinea	✓	✓	✓	✓
Guinea-Bissau	✓	✓	✓	✓
Guyana	✓	✓	✓	✓
Haiti	✓	✓	✓	✓
Holy See	✓			
Honduras	✓	✓	✓	✓
Hungary	✓	✓	✓	✓
Iceland	✓	✓	✓	✓
India	✓	✓	✓	✓
Indonesia	✓	✓	✓	✓
Iran (Islamic Republic of)		✓	✓	
Iraq		✓	✓	
Ireland	✓	✓	✓	✓
Israel	✓	✓	✓	✓
Italy	✓	✓	✓	✓
Jamaica	✓	✓	✓	✓
Japan	✓	✓	✓	✓
Jordan	✓	✓	✓	✓
Kazakhstan	✓	✓	✓	
Kenya	✓	✓	✓	✓
Kiribati		✓		
Kuwait		✓	✓	✓
Kyrgyzstan	✓	✓	✓	✓
Lao People's Democratic Republic		✓	✓	
Latvia	✓	✓	✓	✓
Lebanon	✓	✓	✓	
Lesotho	✓	✓	✓	✓
Liberia	✓	✓	✓	
Libyan Arab Jamahiriya	✓	✓	✓	
Liechtenstein	✓	✓	✓	✓
Lithuania	✓	✓	✓	✓
Luxembourg	✓	✓	✓	✓
Madagascar	✓	✓	✓	✓
Malawi	✓	✓	✓	✓
Malaysia	✓	✓		✓

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Maldives		✓		✓
Mali	✓	✓	✓	✓
Malta	✓	✓	✓	✓
Marshall Islands		✓		
Mauritania	✓	✓	✓	✓
Mauritius	✓	✓	✓	✓
Mexico	✓	✓	✓	✓
Micronesia (Federated States of)	✓	✓		
Monaco	✓	✓	✓	
Mongolia	✓	✓	✓	✓
Morocco	✓	✓	✓	✓
Mozambique		✓	✓	✓
Myanmar		✓		✓
Namibia	✓	✓	✓	✓
Nauru		✓	✓	
Nepal	✓	✓	✓	✓
Netherlands	✓	✓	✓	✓
New Zealand	✓	✓	✓	✓
Nicaragua	✓	✓	✓	✓
Niger	✓	✓	✓	✓
Nigeria	✓	✓	✓	✓
Norway	✓	✓	✓	✓
Oman	✓	✓		✓
Pakistan	✓	✓		✓
Palau		✓		
Panama	✓	✓	✓	✓
Papua New Guinea		✓	✓	✓
Paraguay	✓	✓	✓	✓
Peru	✓	✓	✓	✓
Philippines	✓	✓	✓	✓
Poland	✓	✓	✓	✓
Portugal	✓	✓	✓	✓
Qatar	✓	✓		✓
Republic of Korea	✓	✓	✓	✓
Republic of Moldova	✓	✓	✓	✓
Romania	✓	✓	✓	✓
Russian Federation	✓	✓	✓	
Rwanda	✓	✓	✓	✓

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Saint Kitts and Nevis	✓	✓		✓
Saint Lucia	✓	✓		✓
Saint Vincent and the Grenadines	✓	✓	✓	✓
Samoa		✓		
San Marino		✓	✓	
Sao Tome and Principe		✓	✓	
Saudi Arabia	✓	✓		✓
Senegal	✓	✓	✓	✓
Serbia and Montenegro	✓	✓	✓	
Seychelles		✓	✓	
Sierra Leone		✓	✓	✓
Singapore	✓	✓		✓
Slovakia	✓	✓	✓	✓
Slovenia	✓	✓	✓	✓
Solomon Islands		✓		✓
Somalia		✓	✓	
South Africa	✓	✓	✓	✓
Spain	✓	✓	✓	✓
Sri Lanka	✓	✓	✓	✓
Sudan	✓	✓	✓	
Suriname	✓	✓	✓	✓
Swaziland	✓	✓	✓	✓
Sweden	✓	✓	✓	✓
Switzerland	✓	✓	✓	✓
Syrian Arab Republic	✓	✓	✓	
Tajikistan	✓	✓	✓	
Thailand	✓	✓	✓	✓
The Former Yugoslav Republic of Macedonia	✓	✓	✓	✓
Timor-Leste		✓	✓	
Togo	✓	✓	✓	✓
Tonga	✓	✓	✓	✓
Trinidad and Tobago	✓	✓	✓	✓
Tunisia	✓	✓	✓	✓
Turkey	✓	✓	✓	✓
Turkmenistan		✓	✓	

Country	Berne Convention	Universal Declaration of Human Rights	International Covenant on Civil and Political Rights	TRIPS Agreement
Tuvalu		✓		
Uganda		✓	✓	✓
Ukraine	✓	✓	✓	
United Arab Emirates	✓	✓		✓
United Kingdom of Great Britain and Northern Ireland	✓	✓	✓	✓
United Republic of Tanzania	✓	✓	✓	✓
United States of America	✓	✓	✓	✓
Uruguay	✓	✓	✓	✓
Uzbekistan	✓	✓	✓	
Vanuatu		✓		
Venezuela	✓	✓	✓	✓
Vietnam	✓	✓	✓	
Yemen		✓	✓	
Zambia	✓	✓	✓	✓
Zimbabwe	✓	✓	✓	✓

APPENDIX 3

Table of Membership of Regional Human Rights Instruments

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	American Convention on Human Rights 1969	African Charter on Human and Peoples' Rights 1981
Albania	Argentina	Algeria
Andorra	Barbados	Angola
Armenia	Bolivia	Benin
Austria	Brazil	Botswana
Azerbaijan	Chile	Burkina Faso
Belgium	Colombia	Burundi
Bosnia and Herzegovina	Costa Rica	Cameroon
Bulgaria	Dominica	Cape Verde
Croatia	Dominican Republic	Central African Republic
Cyprus	Ecuador	Chad
Czech Republic	El Salvador	Comoros
Denmark	Grenada	Democratic Republic of Congo
Estonia	Guatemala	Republic of the Congo
Finland	Haiti	Côte d' Ivoire
France	Honduras	Djibouti
Georgia	Jamaica	Egypt
Germany	Mexico	Equatorial Guinea
Greece	Nicaragua	Eritrea
Hungary	Panama	Ethiopia
Iceland	Paraguay	Gabon
Ireland	Peru	Gambia
Italy	Suriname	Ghana
Latvia	Trinidad and Tobago	Guinea
Liechtenstein	United States	Guinea-Bissau
Lithuania	Uruguay	Kenya
Luxembourg	Venezuela	Lesotho
Malta		Liberia
Moldova		Libya
Monaco		Madagascar
Netherlands		Malawi
Norway		Mali
Poland		Mauritania
Portugal		Mauritius

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950		African Charter on Human and Peoples' Rights 1981
Romania		Mozambique
Russia		Namibia
San Marino		Niger
Serbia and Montenegro		Nigeria
Slovakia		Rwanda
Slovenia		Western Sahara (SADR)
Spain		Sao Tome and Principe
Sweden		Senegal
Switzerland		Seychelles
The Former Yugoslav Republic of Macedonia		Sierra Leone
Turkey		Somalia
Ukraine		South Africa
United Kingdom		Sudan
		Swaziland
		Tanzania
		Togo
		Tunisia
		Uganda
		Zambia
		Zimbabwe

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- 1952 Geneva Universal Copyright Convention
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- 1966 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966)
- 1994 TRIPS Agreement (Agreement on Trade-related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C of World Trade Organisation Agreement) (April 15, 1994), (MTN/FA II-AIC)
- 1996 WIPO Copyright Treaty, of December 20, 1996, Geneva

Regional Materials

- 1969 American Convention on Human Rights, O.A.S. Treaty Series No. 36
- 1981 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5
- 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
- 1992 North American Free Trade (NAFTA) Agreement
- 1993 Cartagena Decision 351 on Author's Rights and Connected Rights (December 17, 1993) of the Commission of the Cartagena Agreement

European Materials

- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

1952 First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms

2001 European Parliament and Council Directive of May 22 on the harmonisation of certain aspects of copyright and related rights in the information society

National Laws

France

1789 Declaration of the Rights of Man and the Citizen of August 26, 1789

1791 Law of 17 January 1791 on inventions

1793 Law of 19-24 July 1793 on author's rights

1946 Constitution of October 27, 1946

1957 Law of March 11th 1957, No. 57-298 on literary and artistic works

1958 Constitution of October 4, 1958

1985 Law of 3 July 1985, No. 85-660 on computers

1992 Law of 1 July 1992, No. 92-597 – Intellectual Property Code

Germany

1871 Law

1876 Law concerning the Right of the Author in Works of Figurative Art

1901 Act of June 19 relating to Publishing Law

1907 Act of January 9 on Authors' Rights in Artistic Works and Photography

1910 Law of May 22, 1910

1949 Basic Law of the Federal Republic of Germany of May 23, 1949, as amended by the Unification Treaty of August 31, 1990

1965 Author's Right and Related Protection Rights Law of September 9, 1965, as amended by the Law of June 9, 1993

Prussia

1837 Law on the Protection of Property in Works of Science and Art of June 11

United Kingdom

1710 Copyright Act (8 Anne c.19)

1842 Copyright Act (5 & 6 Vict., c.45, c.100)

1911 Copyright Act (1 & 2 Geo. 5, c.46)

1956 Copyright Act (4 & 5 Eliz. 2, c.74)

1988 Copyright, Designs and Patents Act (c.48)

1998 Human Rights Act (c.48)

United States of America

1787 Constitution of the United States of America

1790 Act of May 31, 1790, Ch. 15, 1 Stat. 124

1909 Copyright Act of March 4, 1909, Ch. 320, 35 Stat. 1075

1948 American Declaration of the Rights and Duties of Man

1976 Copyright Act, 17 U.S.C. §§101-810 (1976)

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Table of Cases

France

Areva v. Greenpeace, TGI Paris, July 9, 2004.....	4.5.4.1
Babolat Maillot Witt v. Pachot, Cass., March 7, 1986: (1986) 129 R.I.D.A. 130.....	1.3.2.2
BMG Music Pub., Laurent Boutonnat, Jean-Claude Dequeant and Universal Music Pub. v. Lancelot Films, TGI Paris, November 29, 2000: (2001) 189 R.I.D.A. 377.....	4.5.4.1
Chaplin v. Chatelus, TGI Paris, January 24, 2000: (2000) 186 R.I.D.A. 305.....	1.3.2.3, 4.4.4.1
Charles Schultz and United Syndicate Inc. v. Editions Albin Michel, Marion Vidal, TGI Paris, January 19, 1977: (1977) 92 R.I.D.A. 167.....	4.5.4.1
“Dali costumes”, Cass., March 5, 1968, D. 1968, 382.....	1.3.2.3, 4.4.4.1
Dechavanne, CA Douai, December 23, 1992.....	3.5.4.2
Deforge v. Trust Co. Bank (La Bicyclette Bleu), Cass. 1, Civ., February 4, 1992: (1992) 152 R.I.D.A. 196; C.A. Versailles, December 15, 1993, (1994) 160 R.I.D.A.255.....	4.5.4.1
Delorme v. Clavier, TGI Nanterre, March 1, 1996: (1996) 167 R.I.D.A. 180.....	4.5.4.1
Decision of CA Paris, 1e ch., April 1, 1957: (1957) 18 R.I.D.A. 198.....	1.3.2.2
Decision of CA Paris, 4e ch., March 4, 1982: (1983) Dalloz 93.....	1.3.2.2
Decision of Cour de Cassation, January 31, 1961: (1961) Dalloz 81.....	3.5.4.1
Decision of Cour de Paris, October 29, 1957: (1958) Ann. 205.....	3.5.4.1
Decision of Tribunal Grande Instance de Paris, March 31, 1969: (1970) RTDC 395 (No. 1).....	3.5.4.1
Deveria v. “l’Express”, CA Paris, October 31, 1988: Cahiers du Droit D’Auteur, April 22, 1989.....	3.5.4.2
Duchêne v. David LaChapelle Studios et al., TGI Paris, 3e ch., May 10, 2002: (2002) 194 R.I.D.A. 332.....	3.5.4.2
Esso v. Greenpeace, TGI Paris, January 30, 2004.....	4.5.4.1

Fabris v. Sté France 2, C.A. Paris, 4e Ch., May 30, 2001: (2002) I.I.C. 995.....	4.5.4.1
Garnier v. Rochette, C.A. Paris, 4e Ch., February 21, 1996: (1996) 169 R.I.D.A. 383.....	4.5.4.1
“Godot”, TGI Paris, October 15, 1992: (1993) 155 R.I.D.A. 225.....	1.3.2.3, 3.5.4.2, 4.4.4.1
J. L’Hoir v. Hatje Cantz Verlag – RG 03/12669, TGI Paris, 3 Ch. Sect., September 14, 2004.....	4.5.4.1
Ophals v. Agence France Presse, TGI Paris, 1ère ch., May 5, 1999: (2002) 183 R.I.D.A. 345.....	1.3.2.3, 4.4.4.1
“Phillip Morris”, C.A. Versailles, March 17, 1994: (1995) 164 R.I.D.A. 350.....	4.5.4.1
SARL Ed. Prod. Musicales du Pactole et al. v. Sté Ed. Arpège, TGI Paris, January 9, 1970, RTD com. 1972, 383.....	4.5.4.1
Schoendoerffer v. Mod Films, TGI Paris, March 23, 1994: (1995) 164 R.I.D.A. 401.....	1.3.2.3, 3.5.4.2, 4.4.4.1
Scrive v. Rennes, C.A. Paris, July 10, 1975, D. 1977, 342: (1997) 91 R.I.D.A. 114.....	1.3.2.3, 4.4.4.1
SNC Prisma Presse and EURL Femme v. Monsieur V. and Association Apodeline, TGI Paris, February 13, 2001.....	4.5.4.1
Sté Marc Dorcel v. Sté Edgar Rice Burroughs, Versailles Court of Appeal, November 6, 1998: (1999) 181 R.I.D.A. 314.....	3.5.4.2
Sté Sebdo and Jacques Faizant v. Editions Enoch, C.A. Paris, May 11, 1993: (1993) 157 R.I.D.A. 340.....	4.5.4.1

Germany

Alcolix case, BGH, March 11, 1993: (1994) G.R.U.R. 206, (1994) 25 I.I.C. 605.....	3.5.5.2, 4.5.5.1
Asterix Parodies case, BGH, March 11, 1993: (1994) 25 I.I.C. 610.....	2.5.5.2, 4.5.5.1
“Auschwitz Lie”, 90 BVerfGE 241 (1994).....	2.5.5
“Bibliotheksgroschen”, BVerfGE, (1972) 8 G.R.U.R. 485.....	5.3.1
Bild Zeitung, Court of Appeal (Kammergericht) Berlin, November 26, 1968:	

[1969] 54 U.F.I.T.A. 296.....	3.5.5.2
“Böll”, 54 BVerfGE 208 (1980).....	2.5.5
Bundesadler, BGH, (2003) G.R.U.R. 956.....	4.5.5.1
CB-Infobank I, BGH, January 16, 1997: (1997) G.R.U.R. 459.....	4.5.5.1
CB-Infobank II, BGH, January 16, 1997: (1997) G.R.U.R. 464.....	4.5.5.1
Disney Parody case, BGH, (1971) G.R.U.R. 588.....	4.5.5.1
“Election campaign”, 61 BVerfGE 1 (1982).....	2.5.5
“Germania 3”, BVerfGE, June 29, 2000: (2001) 2 G.R.U.R. 149; Zeitschrift für Urheber – und Medienrecht, 2000, 867.....	3.5.5.1
“Gies Eagle”, BGH, March 20, 2003: (2004) 35 I.I.C. 984.....	4.5.5.1
Havemann, BVerfGE, 1BvR 1611/99, December 17, 1999.....	4.5.5.1
“Holocaust Denial”, 90 BVerfGE 241 (1994).....	2.5.5
“Kirchenmusik”, BVerfGE, (1979) 84 U.F.I.T.A. 317.....	5.3.1
“Kirchen-und Schulgebrauch”, BVerfGE, (1972) 8 G.R.U.R. 481.....	5.3.1
Lili Marlene, BGH, March 7, 1985: (1987) G.R.U.R. 34.....	4.5.5.1
“Lüth”, 7 BVerfGE 198 (1958).....	2.5.5
Maifeiern, Landgericht Berlin, (1962) G.R.U.R. 1962.....	4.5.5.1
“Maske in Blau”, BGH, April 29, 1970: (1971) G.R.U.R. 35.....	1.3.2.3, 3.5.5.2, 4.4.5.1
Mattscheibe, BGH, (2000) G.R.U.R. 703.....	4.5.5.1
Neo-Fascist Slant In Copyright Works, OLG Frankfurt-am-Main, December 6, 1994: [1996] E.C.C. 375.....	3.5.5.2
“Oppenheimer”, OLG Munich, April 15, 1971.....	1.3.2.3, 4.4.5.1
Re the Parodying of Cigarette Advertising, BGH, April 17, 1984: (1986) E.C.C.1.....	3.5.5.2
“Römerberg Speech”, 54 BVerfGE 129 (1980).....	2.5.5
“Schallplatten”, BVerfGE, (1972) 8 G.R.U.R. 491.....	5.3.1
“Schulfunksendungen”, BVerfGE, (1972) 8 G.R.U.R. 487.....	5.3.1
Sherlock Holmes case, BGH, February 2, 1958: (1959) G.R.U.R. 402.....	3.5.5.2
“Soldiers-Are-Murderers” (Tucholsky), 93 BVerfGE 266 (1995).....	2.5.5
“Strauß Caricature”, 75 BVerfGE 369 (1987).....	2.5.5
Terroristenbild, Landgericht Berlin, May 26, 1977: (1978) G.R.U.R. 108.....	4.5.5.1
“Tonbandvervielfältigung”, BVerfGE, (1972) 8 G.R.U.R. 488.....	5.3.1
“Viel Spass Mit”, LG Munich I, August 2, 1966: (1974) Copyright 97.....	3.5.5.2

New Zealand

Plix Products Limited v. Frank M. Winstone (Merchants) and Others (1986)
F.S.R. 63.....1.3.2.1

United Kingdom

A-G v. Guardian Newspapers Ltd. (No.2) [1990] 1 A.C. 109.....2.5.2, 5.3.2
Ashdown v. Telegraph Group Ltd. [2001] E.M.L.R. 44; [2001] 2 W.L.R.
967; [2002] Ch.149, C.A.....Intro.1, 3.5.2.2,
4.5.2.1, 5.2.1, 5.3.2, 5.3.3, 5.4
Associated Newspapers Group plc v. News Group Newspapers Ltd.
[1986] R.P.C. 515.....5.2.1
Beggars Banquet Ltd. v. Carlton Television and Spidercom Ltd. [1993]
E.M.L.R. 349.....5.2.1
Beloff v. Pressdram [1973] 1 All E.R. 241.....4.5.2.1, 5.2.1,
5.3.2
Betsen v. CBS United Kingdom Ltd. [1994] E.M.L.R. 467.....4.5.2.1
Bonnard v. Perryman [1891] 2 Ch. 269.....2.5.2
British Broadcasting Corp. v. British Satellite Broadcasting Ltd. [1991]
2 All E.R. 833; [1992] Ch.141.....4.5.2.1, 5.2.1
British Oxygen v. Liquid Air Ltd. [1925] Ch. 383.....5.2.1
BSC v. Granada TV Ltd. [1981] A.C. 1096.....5.3.2
Campbell v. MGN [2004] HL 22; [2004] 2 AC 257.....2.5.2
Catnic Components Ltd. v. Hill & Smith Ltd. [1978] F.S.R. 405.....5.4
Clark v. Associated Newspapers Ltd [1998] 1 W.L.R. 1558.....3.5.2.1
Confetti Records v. Warner Music UK Ltd [2003] E.M.L.R. 35.....3.5.2.2
Cream Holdings Ltd v. Banerjee [2004] HL 44; [2005] AC 253.....2.5.2
Derbyshire County Council v. Times Newspapers Ltd [1993] A.C. 534.....2.5.2
Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2001] F.S.R. 11;
[2001] 1 W.L.R. 2416.....4.5.2.1, 5.4
Distillers Co. (Biochemicals) Ltd. v. Times Newspapers [1975] Q.B. 613.....5.2.1
Donaldson v. Beckett (1774) 4 BURR. 2407.....5.3.1
Donoghue v. Allied Newspapers Ltd. [1938] Ch. 106.....5.4
Douglas v. Hello! (2001) 2 All E.R. 289.....2.4.2.3

Ellis v. Home Office [1953] 2 Q.B. 135.....	5.3
Exxon Corp. v. Exxon Insurance Consultants International Ltd. [1982] Ch. 119; [1981] All E.R. 241; [1982] R.P.C. 69; [1981] 2 All E.R. 495; [1981] F.S.R. 238.....	1.3.2.2
Francis, Day & Hunter Ltd. v. Bron [1963] Ch. 587.....	4.5.2.1
Frisby v. British Broadcasting Corp. [1967] Ch. 932.....	4.4.2.1
G.A. Cramp & Sons Ltd. v. Frank Smythson Ltd. [1944] A.C. 329, HL ; Reversing [1943] Ch. 133, CA.....	1.3.2.2
Gartside v. Outram (1856) 26 L. J. 113.....	5.3.2
George Ward (Moxley) Ltd. v. Richard Sankey Ltd. [1988] F.S.R. 66.....	5.4
Gleeson v. H.R. Denne Ltd. [1975] R.P.C. 471.....	5.4
Glyn v. Weston Feature Film Co. [1916] 1 Ch. 261 (Ch. D.).....	4.5.2.1
Gomme (E.) Ltd. v. Relaxateze Upholstery Ltd. [1976] R.P.C. 377.....	5.4
Harman Pictures N.V. v. Osborne [1967] 1 W.L.R. 723.....	4.5.2.1
Hawkes & Son (London) Ltd v. Paramount Film Service Ltd [1934] Ch. 593.....	4.5.2.1
Hubbard v. Vosper [1972] 2 Q.B. 84.....	4.5.2.1, 5.2.1, 5.2.3, 5.3.2
Humphreys v. Thompson & Co Ltd [1905-10] Mac.C.C. 148.....	4.4.2.1
Hyde Park Residence Ltd v. Yelland And Others [2001] Ch. 43.....	2.5.3.1, 4.5.2.1, 5.3.2
IBCOS Computers Ltd v. Barclays Mercantile Highland Finance Ltd [1994] F.S.R. 275.....	4.5.2.1, 5.4
Imutran Ltd v. Uncaged Campaigns Ltd [2001] 2 All E.R. 385.....	4.5.2.1
Independent Television Publications v. Time Out [1984] F.S.R. 64.....	4.5.2.1
Interlego AG v. Tyco Industries Inc. [1989] A.C. 217; [1988] 3 W.L.R. 678; [1988] 3 All E.R. 949; [1988] R.P.C. 343.....	1.3.2.2
Johnstone Safety Ltd v. Peter Cook (Int.) Plc [1990] F.S.R. 161, C.A.....	4.5.2.1
Joy Music v. Sunday Pictorial Newspapers (1920) Ltd [1960] 2 Q.B. 60; [1960] 2 W.L.R. 645; [1960] 1 All E.R. 703; 104 S.J. 289, QB.....	4.5.2.1
K (A Child) v. BBC (2001) All E.R. 323.....	2.4.2.3
L.B. (Plastics) Ltd. v. Swish Products Ltd [1979] R.P.C. 551, H.L.....	4.5.2.1, 5.4
Lion Laboratories v. Evans [1985] Q.B. 526.....	5.3.2
Marengo v. Daily Sketch and Sunday Graphic Ltd [1948] 65 R.P.C. 242.....	3.5.2.1

Michael Baigent and Richard Leigh v. The Random House Group Limited [2006] E.W.H.C. 719, Ch.....	5.4
Millar v. Taylor (1769) 4 BURR. 2301.....	5.3.1
Moore v. News of the World Ltd [1972] 1 Q.B. 441.....	3.5.2.1
Morrison Leahy Music Ltd v. Lightbond Ltd [1993] E.M.L.R. 144.....	1.3.2.3, 3.5.2.2, 4.4.2.1
Newspaper Licensing Agency Ltd v. Marks and Spencer Plc [2001] Ch. 257; [2001] R.P.C. 76.....	4.5.2.1
NWL Ltd. v. Nelson [1979] I.C.R. 867.....	2.5.2
Pasterfield v. Denham [1999] F.S.R. 168.....	3.5.2.2
PCR Ltd v. Dow Jones Telerate Ltd [1998] F.S.R. 170.....	4.5.2.1, 5.3.2
Pro Sieben Media A.G. v. Carlton UK Television Ltd [1998] F.S.R. 43; [1999] F.S.R. 610, C.A.; [1999] 1 W.L.R. 605.....	4.5.2.1
Ravenscroft v. Herbert [1980] R.P.C. 193.....	5.4
R v. Advertising Standards Authority Ltd, ex parte Vernons Organisations Ltd [1992] 1 W.L.R. 1289.....	2.5.2
R v. Central Independent Television plc [1994] 3 All E.R. 641, C.A.....	2.3.2.4
R v. Shayler [2003] 1 A.C. 247.....	2.5.2
Redmond-Bate v. DPP (1999) 7 B.H.R.C. 375.....	Intro.1
Silkin v. Beaverbrook Newspapers Ltd [1958] 1 W.L.R. 743.....	Intro.1
Schweppes Ltd v. Wellingtons Ltd [1984] F.S.R. 210.....	4.5.2.1
Time Warner Entertainment Ltd v. Channel 4 Television Corporation Plc [1994] E.M.L.R. 1.....	4.5.2.1, 5.2.1
Times Newspapers Ltd. and Harper Collins Ltd. v. MGN Limited [1993] E.M.L.R. 442.....	5.3.2
Tidy v. Trustees of the Natural History Museum [1996] EIPR 86; (1995) 39 I.P.R. 501.....	1.3.2.3, 3.5.2.2, 3.5.4.2
University of London Press Ltd. v. University Tutorial Press Ltd. [1916] 2 Ch. 601 (Ch. D).....	1.3.2.2
Venables v. News Group Newspapers [2001] 1 All E.R. 908.....	2.3.2.4
Weatherby v. International Horse Agency and Exchange Ltd. [1910] 2 Ch. 297.....	5.2.1
Williamson Music Ltd v. Pearson Partnership [1987] F.S.R. 97.....	4.5.2.1

United States

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).....	2.5.3
Abrams v. United States, 250 U.S. 616 (1919).....	2.5.5, 4.2.2.1
Addison-Wesley Publishing Co. v. Brown, 207 F. Supp. 678 (E.D.N.Y. 1962).....	2.5.3.2
Alfred Bell & Co Ltd v. Catalda Fine Arts Inc., 191 F.2d 99 (2 nd Cir. 1951).....	1.3.2.2
Aliotti v. R. Dakin & Co., 831 F.2d 898 (9 th Cir. 1987).....	5.4
American Communications Ass. v. Douds, 339 U.S. 382 (1950).....	2.5.3
American Family Life Ins. Co. v. Hagan, 266 F. Supp. 2d 682 (N.D. Ohio 2002).....	4.5.3.1
American Law Book Co. v. Chamberlayne, 165 F. 313 (2d Cir. 1908).....	3.5.3.1
America's Best Family Showplace Corp. v. City of New York, Dept. of Bldgs, 536 F. Supp. 170 (E.D.N.Y. 1982).....	2.5.3
A&M-Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9 th Cir. 2001).....	4.5.3.1, 5.2.2
Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), <i>cert. dismissed</i> , 464 U.S. 1033 (1984).....	5.4
Arica Inst., Inc. v. Palmer, 970 F.2d 1067 (2d Cir. 1992).....	4.5.3.1
Atari, Inc. v. N. Am. Philips Consumer Elec. Corp., 672 F.2d 607 (7 th Cir. 1982).....	5.4
Autry v. Republic Prods., Inc., 213 F.2d 667 (9 th Cir.), <i>cert. denied</i> , 348 U.S. 858 (1954).....	3.5.3.2
Baker v. Selden, 101 U.S. 99 (1879).....	1.3.2.1, 5.4
Barnicki v. Vopper, 532 U.S. 514 (2001).....	2.5.3
Basic Books, Inc. v. Kinkos Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).....	3.5.3.1
Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929).....	3.5.3.1
Benson v. Paul Winley Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978).....	3.5.3.1
Berkic v. Crichton, 761 F.2d 1289 (9 th Cir.), <i>cert. denied</i> , 474 U.S. 826 (1985).....	5.4
Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964).....	4.5.3.1
Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989).....	2.5.3
Brandenburg v. Ohio, 395 U.S. 444 (1969).....	2.5.3

Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127 (N.D. Cal. 1986).....	5.4
Brown v. Louisiana, 383 U.S. 131 (1966).....	2.5.3
Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610 (2d Cir. 1982).....	5.4
Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).....	4.5.3.1
Cardtoons L.C. v. Major League Baseball Players Association 95 F 3d 959, 39 U.S.P.Q. 2d 1865, 1865 (10 th Cir, 1996).....	6.1
Carte v. Ford, 15 F. 439 (C.C.D. Md. 1883).....	3.5.3.1
Carter v. Hemsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994), later opinion, 861 F. Supp. 303 (S.D.N.Y. 1994).....	3.5.3.2
Castle Rock Enter. v. Carol Pub. Group, Inc., 150 F.3d 132 (2d Cir. 1998).....	4.5.3.1
Central Hudson Gas & Electrical Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).....	2.5.3
Chi. Sch. Reform Bd. Of Trustees v. Substance, Inc., 79 F. Supp. 2d 919 (N.D. Ill. 2000).....	5.2.2
Choe v. Fordham University School of Law, 920 F. Supp. 44 (S.D.N.Y. 1995).....	3.5.3.2
Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc., 674 F. Supp. 671 (D. Minn. 1987).....	5.4
City of Dallas v. Stranglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989).....	2.5.3
Clark v. Grenada, Case 10.325, Report No. 2/96, Inter. Am. C.H.R., OEA/Ser. L/V/II.91 Doc. 7 (1996).....	2.4.3.3
Clemens v. Belford, Clark & Co, 14 F. 728 (C.C.N.D. Ill. 1883).....	3.5.3.1
Clevenger v. Baker, Voorhis & Co., 8 N.Y.2d 187 N.E.2d 643 (1980), appeal denied, 9 N.Y.2d 755, 214 N.Y.S.2d 736 (1961).....	3.5.3.1
Cliffs Notes, Inc. v. Bantam Doubledav Dell Publishing Group, Inc., 886 F.2d 490 (2d Cir. 1989).....	3.5.3.1
Cohen v. California, 403 U.S. 15 (1971).....	5.4
Comins v. Discovery Comms., Inc., 200 F. Supp. 2d 512 (D. Md. 2002).....	3.5.3.1
Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988) (dictum), aff'd, 490 U.S. 730 (1989).....	2.5.3.2
Conant v. Walters, 309 F. 3d 629 (9 th Cir. 2002).....	2.5.3

Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983).....	4.5.3.1
Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (S. Ct. 1949).....	3.5.3.2
Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, 600 F.2d 1184 (5 th Cir. 1979).....	4.5.3.1
 Dastar Corp. v. Twentieth Century Fox Film Corp. et al, 123 S. Ct. 2041 (June 2, 2003), on re-hearing C.D.Cal. 68 USPQ 2d 1538 (October 14, 2003); 539 U.S. 23 (2003).....	1.3.2.3, 3.5.3.1, 3.5.3.2, 4.4.3.1
Dawson v. Hinshaw Music, Inc., 905 F.2d 731 (4 th Cir. 1990).....	5.4
Dennis v. United States, 341 U.S. 494 (1951).....	2.5.3
Desney v. Wilder, 46 Cal. 2d 715, 299 P. 2d 257 (1956).....	2.4.3
Diamond v. Am-Law Corp., 745 F.2d 142 (2d Cir. 1984).....	3.5.3.2
Digital Communications Assocs., Inc. v. Softklone Distrib. Corp., 659 F. Supp. 449 (N.D. Ga. 1987).....	5.4
Dr. Seuss Enterprises v. Penguin Books USA, Inc. and another, 109 F. 3d 1394, 42 U.S.P.Q. 2d 1184 (9 th Cir. 1997).....	4.5.3.1
Duffy v. Penguin Books USA Inc., 4 F. Supp. 2d 268 (S.D.N.Y. 1998).....	4.5.3.1
Eldred v. Ashcroft, 123 S.Ct. 769; 537 U.S. 186 (2003); 65 U.S.P.Q. 2d 1225 (SC 2003).....	1.3.2.6, 1.4, 4.5.3.1, 5.5
Eldred v. Reno, 74 F. Supp. 2d 1 (DDC 1999).....	4.5.3.1
Elsemere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y. 1980), aff'd, 623 F.2d 252 (2d Cir. 1980).....	4.5.3.1
English v. BFC & R East 11 th Street LLC, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. 1997), aff'd, 198 F.3d 233 (2d Cir. 1999).....	3.5.3.2
Entertainment Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).....	2.5.3
Fantasy, Inc. v. Fogerty, 664 F. Supp. 1345 (N.D. Cal. 1987).....	5.4
Feist Publications Inc. v. Rural Telephone Service Co. Inc., 499 U.S. 340; 111 S.Ct. 1282; 18 U.S.P.Q. 2d 1275 (1991).....	1.3.2.2, 5.4
Film Corp. v. Doyal, 286 U.S. 123 (1932).....	5.3.1

Fisher v. Dees, 794 F.2d 432 (9 th Cir. 1986).....	4.5.3.1
Fogerty v. Fantasy, Inc., 114 S. Ct. 1023 (1994).....	5.3.1
Follett v. Arbor House Publishing Co., 208 U.S.P.Q. 597 (S.D.N.Y. 1980).....	3.5.3.1
Folsom v. Marsh, 9 F. Cas. (C.C.D. Mass. 1841) (No. 4,901).....	5.2.2
Frisby v. Schultz, 478 U.S. 474 (1988).....	2.5.3
Garner v. Louisiana, 368 U.S. 157 (1961).....	2.5.3
Geisel v. Poynter Prods., Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), 295 F. Supp. 331 (S.D.N.Y. 1968).....	3.5.3.1
Gershwin v. Ethical Publishing Co., 166 Misc. 39, 1 N.Y.S.2d 904 (S. Ct. N.Y. County 1937).....	3.5.3.1
Giesecking v. Urania Records, Inc., 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. N.Y. County 1956).....	3.5.3.1
Gilliam v. American Broadcasting Companies, 538 F.2d 14 (2 nd Cir. 1976).....	1.3.2.3, 3.5.3.1, 3.5.3.2, 4.4.3.1
Goldstein v. California, 412 U.S. 546 (1973).....	5.3.1
Graham v. James, 144 F.3d 229 (2d Cir. 1998).....	2.5.3.1
Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).....	3.5.3.1
Gray v. Russell, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).....	5.2.2
Harms, Inc. v. Tops Music Enters., Inc., 160 F. Supp. 77 (S.D. Cal. 1958).....	3.5.3.2
Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); 225 U.S.P.Q. 1073 (1985).....	4.5.3.1, 5.3.1, 5.4
Hartman v. Hallmark Cards, Inc., 833 F.2d 117 (8 th Cir. 1987).....	5.4
Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9 th Cir. 1971).....	5.4
Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 59 U.S.P.Q. 2d 1865 (9 th Cir. 2001).....	3.5.3.1, 6.1
Hospital For Sick Children v. Melody Fare Dinner Theatre, 516 F. Supp. 67 (E.D. Va. 1980).....	3.5.3.1
Hustler Magazine v. Falwell, 485 U.S. 46 (1988).....	3.5.3.1
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).....	2.5.3
Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).....	4.5.3.1

Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8 th Cir. 2003).....	2.5.3
Iowa State University Research Foundation, Inc. v. American Broadcasting Company, Inc., 621 F.2d 57 (2d Cir. 1980).....	4.5.3.1
Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971).....	3.5.3.1
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, 1 Media L. Rep. (BNA) 1357 (1952).....	2.5.3
Kennedy v. National Juvenile Detention Ass'n, 187 F.3d 690 (7 th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1159 (2000).....	2.5.3.1
Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).....	3.5.3.1
King v. Innovation Books, Div. Of Innovative Corp., 976 F.2d 824 (2d Cir. 1992).....	3.5.3.1
Klaidienst v. Mandel, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972).....	2.5.3
Kreimer v. Bureau of Police for Town of Morristown, 958 F. 2d 1242 (3 rd Cir. 1992).....	2.5.3
Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450 (S.D.N.Y. 1968).....	3.5.3.1
Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9 th Cir.), <i>cert. denied</i> , 469 U.S. 1037 (1984).....	5.4
L.A. Times v. Free Republic, 54 U.S.P.Q. 2d (BNA) 1453 (C.D. Cal. 2000).....	4.5.3.1, 5.2.2
Leibovitz v. Paramount Pictures Corp., 41 U.S.P.Q. 2d 1598 (S.D.N.Y. 1996), <i>aff'd</i> , 137 F.3d 109 (2d Cir. 1998).....	4.5.3.1
Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11 th Cir. 2000).....	3.5.3.2
Litchfield v. Spielberg, 736 F.2d 1352 (9 th Cir. 1984), <i>cert. denied</i> , 470 U.S. 1052 (1985).....	5.4
Lubner v. City of Los Angeles, 45 Cal. App. 4 th 525 (1996).....	1.3.2.3, 4.4.3.1
Luster Enters., Inc. v. Twentieth Century-Fox Film Corp., 156 U.S.P.Q. 422 (S. Ct. N.Y. County 1967).....	3.5.3.1
Malden Amusement Co., Inc. v. City of Malden, 582 F. Supp. 297 (D. Mass. 1983).....	2.5.3
Martin v. City of Indianapolis, 982 F. Supp. 625 (S.D.Ind. 1997).....	3.5.3.2
Marvullo v. Gruner & Jahr, 105 F. Supp. 2d 225 (S.D.N.Y. 2000).....	3.5.3.2

MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc., 70 U.S.P.Q. 2d 1046 (S.D.N.Y. 2004).....	4.5.3.1
Mattel, Inc., v. MCA Records, Inc., 296 F.3d 894 (9 th Cir. 2002), <i>cert. denied</i> , 537 U.S. 1171 (2003).....	3.5.3.1
Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002).....	4.5.3.1
Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9 th Cir. 2003).....	4.5.3.1
MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).....	4.5.3.1
McCulloch v. Albert E. Price, Inc., 823 F.2d 316 (9 th Cir. 1987).....	5.4
McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971).....	4.5.3.1, 5.1
Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), <i>cert. denied</i> , 434 U.S. 1013 (1978).....	4.5.3.1
Miami Herald v. Tornillo, 418 U.S. 241 (1974).....	2.5.3
Midway Manufacturing Co. v. Artic International, Inc., 704 F.2d 1009 (7 th Cir.), <i>cert. denied</i> , 464 U.S. 823 (1983).....	3.5.3.2
Mischawaka Rubber Wollen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 62 S. Ct. 1022, 86 L. Ed. 1381 (1942).....	2.4.3
Monster Communications, Inc. v. Turner Broadcasting Sys., Inc., 935 F. Supp. 490 (S.D.N.Y. 1996).....	4.5.3.1
National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (W.D. Tex. 1980).....	3.5.3.2
Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F. 3d 585, FED. App. 0363 (6 th Cir. 2003).....	2.5.3
New Era Publications Int'l, ApS v. Carol Pub. Group, 729 F. Supp. 992 (S.D.N.Y. 1990), <i>rev'd in part</i> , 904 F.2d, 152 F.2d (2d Cir.), <i>cert. denied</i> , 498 U.S. 921 (1990).....	4.5.3.1
New Era Publications Int'l, ApS v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989).....	4.5.3.1, 5.2.2
Nichols v. Universal Pictures Corp., 45 F.2d 119 (1930).....	1.3.2.1, 5.4
Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999).....	5.2.2
Núñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1 st Cir. 2000).....	4.5.3.1
Pacific and Southern Company, Inc. v. Duncan, 744 F.2d 1490 (11 th Cir. 1984), <i>rehearing denied</i> , 749 F.2d 733 (11 th Cir. 1984), <i>cert. denied</i> , 471 U.S. 1004	

(1984).....	4.5.3.1
Paramount Pictures Corp. v. Carol Pub. Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998).....	4.5.3.1
Parks v. La Face Records, 329 F.3d 437 (6 th Cir.), cert. denied, 124 S. Ct. 925 (2003).....	2.5.3.1
Pavia v. 1129 Ave. of Americas Assocs., 901 F. Supp. 620 (S.D.N.Y. 1994).....	1.3.2.3, 3.5.3.2, 4.4.3.1
Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).....	5.4
Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 102 (D. Mass. 2003).....	4.4.3.1
Playboy Enterprises, Inc. v. Welles, 7 F. Supp. 2d 1098 (S.D. Cal. 1998).....	3.5.3.1
Procter & Gamble Co. v. Moskowitz, 127 U.S.P.Q. 523 (S.D.N.Y. 1960).....	2.5.3.2
Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967).....	5.2.2
Rand McNally & Co v. Fleet Management Systems, 634 F. Supp. 604 (ND Ill 1986).....	1.3.2.2
Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir. 1976).....	5.4
Rey v. Lafferty, 990 F.2d 1379 (1 st Cir. 1993).....	5.4
Rice v. American Program Bureau, 446 F.2d 685 (2d Cir. 1971).....	3.5.3.2
Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975).....	3.5.3.1
Riggold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997)....	4.5.3.1
Robert Stigwood Group, Ltd. v. Speber, 332 F. Supp. 1206 (S.D.N.Y. 1971), <i>modified</i> , 457 F.2d 50 (2d Cir. 1972).....	3.5.3.2
Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).....	3.5.3.1
Rogers v. Koons, 960 F.2d 301, 22 U.S.P.Q. 2d 1492 (2d Cir. 1992).....	4.5.3.1
Rosemont Enterprises, Inc. v. Random House, Inc., 256 F. Supp. 55 (S.D.N.Y.), <i>rev'd</i> , 366 F.2d 303 (2d Cir. 1966), <i>cert. denied</i> , 385 U.S. 1009 (1967).....	4.5.3.1, 5.2.2
Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9 th Cir. 1970).....	5.4
Roy Export Co. v. CBS, Inc., 672 F.2d 1095 (2d Cir. 1982).....	4.5.3.1, 5.2.2
Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).....	2.5.3

Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), <i>rev'd</i> , 811 F.2d 90 (2d Cir. 1987), <i>cert. denied</i> , 484 U.S. 890 (1988).....	4.5.3.1
Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997), <i>aff'd on other grounds</i> , 147 F.3d 215 (2d Cir. 1998).....	4.5.3.1
Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671, 7 Media L. Rep. (BNA) 1426 (1981).....	2.5.3
Schnapper v. Foley, 471 F. Supp. 426 (D.D.C. 1979), <i>aff'd</i> , 667 F.2d 102 (D.C. Cir. 1981), <i>cert. denied</i> , 455 U.S. 948 (1982).....	5.1
Schneck v. United States, 249 U.S. 47 (1919).....	2.5.3
Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996).....	3.5.3.1
Schroeder v. William Morrow & Co, 566 F.2d 3 (7 th Cir. 1977).....	1.3.2.2
Sheldon v. Metro-Goldwyn-Mayer Pictures Corp., 81 F.2d 49 (2d Cir. 1936).....	5.4
Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9 th Cir. 1977).....	4.5.3.1, 5.4
Simon & Shuster Inc. v. Dove Audio Inc., 970 F. Supp. 279 (S.D.N.Y. 1997).....	3.5.3.1
Smith v. Goguen, 415 U.S. 566 (1974).....	2.5.3
Smith v. Montoro, 648 F.2d 602 (9 th Cir. 1981).....	3.5.3.1
Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).....	4.5.3.1, 5.3.1
Southco, Inc. v. Kanebridge Corp., 53 U.S.P.Q. 2d (BNA) 1490 (E.D. Pa. 2000).....	5.2.2
Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987).....	5.4
Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).....	2.4.3
SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11 th Cir. 2001); 60 U.S.P.Q. 2d 1225 (11 th Cir. 2001).....	4.5.3.1
Texas v Johnson, 491 U.S. 397 (1989).....	2.5.3
Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968).....	4.5.3.1, 5.2.2
Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5 th Cir. 1980).....	4.5.3.1
Twentieth Century Music Corp. v. Aiken, 186 U.S.P.Q. 67 (1974).....	5.3.1
Twin Peaks Prods., Inc. v. Publications International Ltd, 996 F.2d 1366 (2d Cir. 1993).....	4.5.3.1, 5.2.2

United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974).....	5.1
United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).....	2.5.3
United States v. O'Brien, 391 U.S. 367 (1968).....	2.5.3
United Video, Inc. v. Federal Communications Commission, 890 F.2d 1173 (D.C. Cir. 1989).....	5.4
Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9 th Cir. 1981), <i>rev'd</i> , 464 U.S. 417 (1984).....	4.5.3.1
Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).....	2.5.3
Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir.), <i>cert. denied</i> , 476 U.S. 1159 (1986).....	5.4
Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9 th Cir. 1978), <i>cert. denied</i> , 439 U.S. 1132 (1979).....	4.5.3.1, 5.1
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).....	2.5.3
Wheaton v. Peters, 33 U.S. (8 Peters) 591 (1834).....	5.3.1
Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986)...	5.4
Whitney v. California, 274 U.S. 357 (1927).....	4.2.2.1
Williams v. Weisser Publishing Co., 78 Cal. Rptr. 542 (1969).....	3.5.3.1
Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, Prod. Liab. Rep. (CCH) P. 16,314, 106 A.L.R.5 th 759 (D. Conn. 2002).....	2.5.3
Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).....	2.5.3
Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc., 658 F. Supp. 351 (N.D. Tex. 1986).....	3.5.3.2
Wheaton v. Peters, 33 U.S. (8 Peters) 591 (1834).....	5.3.1
Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9 th Cir. 2000).....	4.5.3.1, 5.2.2
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).....	5.2.2, 5.3.1
Zim v. Western Publishing Co., 573 F.2d 1318 (5 th Cir. 1978).....	3.5.3.1

European Decisions

European Court of Justice, Court of First Instance (CFI) and Commission Decisions

R v. Home Secretary, Ex. P. Simms [2000] A.C. 115; [1999] 3 W.L.R. 328...	2.4.2.3,
	2.5.5

European Court of Human Rights and European Commission of Human Rights

Ahmed v. United Kingdom; (22954/93) (1998) 29 E.H.R.R. 1, ECtHR.....	2.4.2.3
Autotronic A.G. v. Switzerland; (12726/87) (1990) 12 E.H.R.R. 485, ECtHR...	2.4.2.3
Barfod v. Denmark; (1989) 13 E.H.R.R. 493, ECtHR.....	2.4.2.3
Barthold v. Germany; (8734/90) (1985) 7 E.H.R.R. 383, ECtHR.....	2.4.2.3
De Haes and Gijssels v. Belgium; (19983/92) (1997) 25 E.H.R.R. 1, ECtHR....	2.4.2.3
Demuth v. Switzerland; (38743/97) (2002) 38 E.H.R.R. 20, ECtHR.....	2.4.2.3
Engel and others v. Netherlands; (A/22) (1976) 1 E.H.R.R. 647, ECtHR.....	2.4.2.3
Familiapress-Zeitungs-GmbH v. Austria; (1992) 80 D.R. 74, ECtHR.....	2.4.2.3
Feldek v. Slovakia; (29032/95) (2001) E.C.H.R. 463.....	2.4.2.3
France 2 v. France; (30262/96) (1997) Informatierecht, 1999, 15, ECommHR.....	4.5.4.1
Fresoz and Roire v. France (1999) 5 B.H.R.C. 654.....	5.4
Groppera Radio A.G. v. Switzerland; (10890/84) (1990) 12 E.H.R.R. 321, ECtHR.....	2.4.2.3
H v. Austria; (20831/92) Decision of 2.3.94 (unpublished).....	2.4.2.3
H and K v. United Kingdom; (1983) 34 D.R. 218, ECtHR.....	2.4.2.3
Handyside v. United Kingdom; (A/24) (1976) 1 E.H.R.R. 737, ECtHR.....	2.4.2.3
Hodgson, Woolf Productions, and National Union of Journalists and Channel 4 Television v. United Kingdom; (11553/85 and 11685/85) (1987) 51 D.R. 136; (1987) 10 E.H.R.R. 503, ECommH.....	2.4.2.3
Jersild v. Denmark; (15890/89) (1994) 19 E.H.R.R. 1, ECtHR.....	2.4.2.3, 5.4
Kjeldsen, Busk Madsen and Pedersen v. Denmark; (1976) 1 E.H.R.R. 711, ECtHR.....	2.4.2.3
Kosiek v. Germany; (Series A No. 105) (1986) 9 E.H.R.R. 328, ECtHR.....	2.4.2.3
Leander v. Sweden; (9248/81) (1987) 9 E.H.R.R. 433, ECtHR.....	2.4.2.3
Lehideux and Inornia v. France; (24662/94) RJD 1998-VII 2864; (1998) 5 B.H.R.C 540, ECtHR.....	2.4.2.3
Lingens v. Austria; (Series A No. 103) (1986) 8 E.H.R.R. 103, ECtHR.....	2.4.2.3
M v. France; (1982) 41 D.R. 103, ECtHR.....	2.4.2.3
Malone v. United Kingdom; (1984) 7 E.H.R.R. 14, ECtHR.....	2.4.2.3
Marais v. France; (31159/96) (1996) 86-A D.R. 184, ECtHR.....	2.4.2.3

Morissens v. Belgium; (11389/85) (1988) 56 D.R. 127, ECommHR.....	2.4.2.3
Muller v. Austria (5849/72) (1988) 13 E.H.R.R. 212, ECtHR.....	2.4.2.3
Muller v. Switzerland (Series A No.133) (1988) 13 E.H.R.R. 212, ECtHR.....	2.4.2.3
N v. Switzerland; (1982) 34 D.R. 208, ECtHR.....	2.4.2.3
Oberschlick v. Austria (No.2); (1997) 25 E.H.R.R. 357, ECtHR.....	2.4.2.3
Otto-Preminger-Institut v. Austria; (13470/87) (1994) 19 E.H.R.R. 34, ECtHR.....	2.4.2.3
Prager and Oberschlick v. Austria; (15974/90) (1995) 21 E.H.R.R. 1, ECtHR.....	2.4.2.3
Silver v. United Kingdom; (1983) 5 E.H.R.R. 347, ECtHR.....	2.4.2.3
Stevens v. United Kingdom; (11674/85) (1986) 46 D.R. 245, ECommHR.....	2.4.2.3
Sunday Times (No. 1) v. United Kingdom (1979) 2 E.H.R.R. 245 (ECtHR).....	2.4.2.3
T v. United Kingdom; (1978) 49 D.R. 5, ECtHR.....	2.4.2.3
Tammer v. Estonia; (41205/98) (2001) 37 E.H.R.R. 43, ECtHR.....	2.4.2.3
The Sunday Times v. The United Kingdom; (A/30) (1979) 2 E.H.R.R. 245, ECtHR.....	2.3.2.4
Thorgeir Thorgeirson Islande v. Iceland; (13778/88) (1992) 14 E.H.R.R. 843, ECtHR.....	2.4.2.3
Tidende v. Norway; (26132/95) (2001) 31 E.H.R.R. 16, ECtHR.....	2.4.2.3
Tolstoy Miloslavsky v. United Kingdom; (1995) 20 E.H.R.R. 442, ECtHR.....	2.4.2.
	2.5.2
Unabhängige Initiative Informations Vielfalt v. Austria; (28525/95) (2003) 37 E.H.R.R. 33, ECtHR.....	2.4.2.3
Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria; (Series A No.302) (1994) 20 E.H.R.R. 55, ECtHR.....	2.4.2.4
Walendy v. Germany; (21128/92) (1992) 80-A D.R. 94, ECtHR.....	2.4.2.3
Wingrove v. United Kingdom; (17419/90) (1996) 24 E.H.R.R. 1, ECtHR.....	2.4.2.3
X v. Germany; (9235/81) (1982) 29 D.R. 194, ECommHR.....	2.4.2.3
X Ltd. and Y v. United Kingdom; (8710/79) (1982) 28 D.R. 77, ECommHR.....	2.4.2.3
Zana v. Turkey; (18954/91) (1997) 27 E.H.R.R. 667, ECtHR.....	2.4.2.3

Alphabetical List of Cases

Abood v. Detroit Board of Education [USA]
Abrams v. U.S [USA]
Addison-Wesley Publishing Co. v. Brown [USA]
A-G v. Guardian Newspapers Ltd (No.2) [UK]
Ahmed v. United Kingdom [ECtHR]
Alcolix Parodies case [Germany]
Alfred Bell & Co Ltd. v. Catalda Fine Arts Inc. [USA]
Aliotti v. R. Dakin & Co [USA]
American Communications Ass. v. Douds [USA]
American Family Life Ins. Co. v. Hagan [USA]
American Law Book Co v. Chamberlayne [USA]
America's Best Family Showplace Corp. v. City of New York [USA]
A&M Records, Inc. v. Napster, Inc. [USA]
Apple Computer, Inc. v. Franklin Computer Corp. [USA]
Areva v. Greenpeace [France]
Arica Inst., Inc. v. Palmer [USA]
Ashdown v. Telegraph Group Ltd [UK]
Associated Newspapers Group plc v. News Group Newspapers Ltd [UK]
Asterix Parodies case [Germany]
Atari, Inc. v. N. Am. Philips Consumer Elec. Corp. [USA]
Autotronic A.G. v. Switzerland [ECtHR]
Autry v. Republic Prods., Inc. [USA]
Babolat Maillot Witt v. Pachot [France]
Baker v. Selden [USA]
Barfod v. Denmark [ECtHR]
Barnicki v. Vopper [USA]
Barthold v. Germany [ECtHR]
Basic Books, Inc. v. Kinkos Graphics Corp. [USA]
Beggars Banquet Ltd v. Carlton Television and Spidercom Ltd [UK]
Beloff v. Pressdram [UK]
Ben-Oliel v. Press Publishing Co [USA]
Benson v. Paul Winley Sales Corp. [USA]

Berkic v. Crichton [USA]
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 Bild Zeitung [Germany]
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 Board of Trustees of the State University of New York v. Fox [USA]
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 Bundesadler [Germany]
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 Campbell v. MGN [UK]
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 CB-Infobank II [Germany]
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Confetti Records v. Warner Music Uk Ltd [UK]
Consumers Union of the United States, Inc. v. General Signal Corp. [USA]
Cream Holdings Ltd v. Banerjee [UK]
Crimi v. Rutgers Presbyterial Church [USA]
“Dali costumes” [France]
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Dechavanne [France]
Deforge v. Trust Co. Bank (La Bicyclette Bleu) [France]
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Dennis v. United States [USA]
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Engel v. Netherlands [ECtHR]
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“Germania 3” [Germany]
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 "Lüth" [Germany]
 M v. France [ECtHR]
 Maifeiern [Germany]
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Marais v. France [ECtHR]
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Sté Sebdo and Jacques Faizant v. Editions Enoch [France]
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